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IN THE

Supreme Court of the United States

October Term, 1968

No. 513

MARVIN HAYUTIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

MARVIN HAYUTIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Marvin Hayutin prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit which was entered in the above entitled case on July 29, 1968, and affirmed a judgment of the United States District Court for the Southern District of New York convicting Petitioner of aiding and abetting violations of the Securities Act of 1933 [15 U.S.C. § 77e(a)] and of conspiracy to violate said Act (18 U.S.C. § 371). Petitioner was sentenced to two and one-half years in prison and to pay fines totalling $14,000.

Opinions Below

The opinion of the Court of Appeals is unreported as of this date and appears as Appendix A to this petition. The judgment of the Court of Appeals appears as Appendix B. The judgment of conviction of the District Court was upon a jury verdict and no written opinion was given by the District Court in connection therewith.

A memorandum opinion of the District Court, unreported but appended hereto as Appendix C, issued upon its decision to grant the Government's proposed order denying Petitioner's motion for permission to take the oral deposition of a witness residing in Europe, rather than Petitioner's proposed order.

Appeals by certain other defendants in earlier proceedings were decided *sub nom. United States* v. *Bilotti*, 380 F.2d 649 (2nd Cir., 1967), cert. den., 389 U.S. 944 (1967).

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed was dated and entered July 29, 1968. A petition for rehearing was denied by order entered on August 14, 1968; a second order denying the same petition was entered on September 6, 1968. These orders appear as Appendix D hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Is the concept of "control", which is undefined in the Securities Act of 1933 but which forms the primary basis for a criminal conviction under Section 5 thereof, consistent with the constitutional requirement of definiteness in criminal statutes?

2. In view of the universally accepted rule of "multiple admissibility" and the constitutional right of a defendant to defend, was Petitioner's offer to prove his defense by live testimony from independent witnesses properly rejected?

3. Is a ruling which sanctions cross-examination of a defendant's witnesses to his reputation for truth and vera-

city by questions suggesting that defendant is acquainted with, or associated with criminals, consistent with this Court's pronouncement in *Michelson* v. *United States*, 335 U.S. 469 (1948)?

4. May Rule 15 of the Federal Rules of Criminal Procedure properly be construed to deny a defendant the right to take an oral deposition, where the witness (a German national) will not attend the trial and resides beyond the subpoena power of the District Court, where his testimony is vital to the defense, and where he has stated in writing his willingness to be deposed?

5. May a District Court properly provide that it will entertain a renewal of a defendant's application to take a deposition in Germany only on condition that the defendant promise to pay the United States Government's expenses in attending?

Constitutional Provision, Statutes and Rule Involved

The constitutional provision, statutes and rule directly involved herein are the Fifth Amendment to the Constitution of the United States; Sections 2, 4 and 5 of the Securities Act of 1933 (15 U.S.C. §§ 77b, 77d and 77e); and Rule 15 of the Federal Rules of Criminal Procedure. These are printed, in pertinent part, in Appendix E to this petition.

Statement of the Case

The indictment herein (65 Cr. 198, U.S.D.C., S.D.N.Y.) charged Petitioner and thirteen other defendants with violating Sections 5(a) and 17(a) of the Securities Act of 1933 [15 U.S.C. §§ 77e(a), 77q(a)], and with conspiring to violate those sections and the Mail Fraud Statute (18

U.S.C. §§ 1341, 1343), in connection with the common stock of Allied Entertainment Corporation of America, Inc. ("Allied"). Petitioner was named in all forty-eight counts.

There were two trials below. Prior to and during the first trial a number of counts were severed or dismissed, and a number of defendants pleaded guilty or were severed. At the close of the first trial eight defendants remained and fourteen counts remained against Petitioner: the conspiracy count (Count 1) and thirteen counts charging Petitioner with aiding and abetting violations of Section 5 of the Securities Act (Counts 2, 3, 4, 5, 6, 8, 10, 12, 14, 16, 18, 19 and 21).

All eight remaining defendants, except Petitioner and one other, were found guilty on at least one count at the first trial. The jury disagreed as to all fourteen open counts against Petitioner.

Petitioner was the only defendant at the second trial, which ultimately resulted in the judgment now sought to be reviewed. The principal witnesses against him at both trials were defendants Harold Schreiber and Anthony Gravino (both of whom had previously pleaded guilty) and co-conspirators Herbert Breger and Miklos Gafni (see A 3).*

Dr. Breger, a dentist who, with a Dr. Blistein, had formed Allied in 1961, was President of Allied, and the principal actor in the events leading to the indictment. As the Court of Appeals stated, "The conspiracy and the subsequent substantive crimes were born of the efforts of two dentists—Breger and Blistein" to raise money for Allied through a public offering (A 4).

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* Numbers prefixed by capital letters refer to pages of the Appendices to this petition.

Gravino was a stockbroker who had admittedly received illegal—and undisclosed—commissions in connection with the unlawful distributions of Allied stock in 1962 and 1963 (102-03).*

Miklos Gafni was president of Tap Records, Inc. ("Tap") and American Stereophonic Corporation ("Stereo") (2472-75). After Breger and Gafni had been introduced by Petitioner, pursuant to Breger's request that Petitioner aid in finding mergers and acquisitions for Allied, Gafni and Breger arranged a merger of Allied, Tap and Stereo (589-91, 2499). The merger was a means of causing 131,500 additional shares of Allied to be issued, with a view to disposal thereof into the market without registration.

Harold Schreiber was engaged to write an unduly optimistic market letter regarding the Allied stock (796-800, 1104, 1117-20). In January of 1963, by a sham transaction with Gafni and a contract backdated to May of 1962, Schreiber also became the nominal owner of half the stock of Tap, and thus half the Allied stock issued to Tap stockholders (827-832). The stock held in Schreiber's name was soon sold to the public without registration.

These four men accused Petitioner of having masterminded the scheme, charging, for example,

> (a) that Petitioner had received a part of the illegal commissions paid to Gravino and another broker defendant (597, 1689);
>
> (b) that the increasing volume of sales having made it difficult to maintain the "rigged" price in New York, Petitioner suggested and arranged the sale of Allied stock in Europe, through the German firm Bankhaus Schneider & Munzing (259-61), of which Klaus Fischer was the director (873); and

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* Numbers unprefixed by a letter refer to pages of the transcript of the second trial below.

(c) that Petitioner had devised the sham transaction between Schreiber and Gafni (193-95).

Petitioner denied these accusations. His defense was that he had not known of the illegal activities of Dr. Breger and the others, and that Breger, Gafni, Gravino and Schreiber had consciously planned and conspired to shift the onus to Petitioner in an effort to avoid or mitigate their own punishment—in plain language, to "frame" him (3380-3459).

Petitioner was never an officer or director of Allied. He testified that his only connection with the company was as a financial advisor on mergers and acquisitions, for which he was paid a total of only $1,500 (2642) and 10,000 shares of Allied stock (2507) which he did not sell (3595).

Each of the four accusers repeatedly admitted to previous lies, most of them under oath and connected with this case (See, e.g., Breger at 323-24, 491-92, 501-03, 510-13, 543-44, 547-48, 552-53; Schreiber at 1056-58, 1061-63, 1119; Gafni at 1490-92, 1499-1500, 1501-02, 1512, 1514-15, 1516-17, 1518-19; and Gravino at 1755-56, 1757, 1760, 1769-70).

It is also noteworthy that Dr. Breger was not indicted for his part in the Allied scheme, and has not lost his license to practice dentistry. Neither was Gafni indicted. Gravino received a suspended sentence. Schreiber has yet to be sentenced on the counts to which he has pleaded guilty.

Petitioner showed, moreover, by his own testimony (2661-90) and that of this brother (2262-91) and an attorney, Mr. Francis J. Purcell (3143-46), that Schreiber and Gafni had made unsuccessful attempts to extort money from Petitioner, threatening to implicate him if they were not bought off (A18).

Petitioner's most direct and dramatic proof of the conspiracy to implicate him, however, was excluded by the

District Court. Petitioner had called two witnesses, Cumberland and Brenengan, to testify to conversations with Gafni and Schreiber in which both prosecution witnesses candidly admitted an intention wrongfully to inculpate Petitioner. The complete offers of proof with respect to these witnesses are set forth in Appendix F to this petition.

Petitioner's trial counsel offered to prove through witness Brenengan that Schreiber had admitted "that he wasn't worried about the Allied case because if the worse came to worse, even though Hayutin had nothing to do with it, he was going to blame it on Hayutin" (F2; see F1).

Through witness Cumberland, Petitioner's counsel offered to prove a conversation wherein Gafni stated "that he was going to be out of the trouble very shortly because he was going to shift all of the blame to Marvin Hayutin; and then the witness said to Gafni 'Did Hayutin do anything wrong in the case?' And Gafni said, 'No, but he, Hayutin, can take care of himself and I can't, and therefore I am going to put the blame on him'" (F6).

Although, as the Court of Appeals noted, these offers were "relevant and probative of the defense" (A16), they were rejected on the ground that Schreiber and Gafni had not been confronted with their statements during cross-examination (F2, F5). The offers were expressly made, not to impeach by prior inconsistent statement, but to prove the defense, a "conspiracy against the defendant" (F5), by evidence of the conspirators' state of mind (F4).*

* * *

Another ruling of the District Court prevented Petitioner from obtaining yet further proof that he had not been a participant in the illegal dealings in the Allied stock. Prior to both trials below, Petitioner unsuccessfully moved under Rule 15 of the Federal Rules of Criminal Procedure

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* Another reason Schreiber and Gafni were not confronted was that counsel for Petitioner was unaware of the Brenengan and Cumberland testimony when Schreiber and Gafni were on the stand (F2, F5).

for permission to take the deposition in Munich, Germany, of Klaus Fischer, director of Bankhaus Schneider & Munzing. Petitioner's counsel, in making the motion which preceded the second trial,* stated:

> "Mr. Fischer will be able to tell the true circumstances surrounding these events; namely that Hayutin made no arrangements with respect to the sale of Allied shares in Germany; that he was never part of a group seeking to sell Allied shares; that in March 1963, Hayutin was in Munich on business entirely unrelated to Allied Entertainment; that Hayutin never had any control over or rights in the Stuart Street accounts; that Hayutin never directed him to give money constituting proceeds of the sales of Allied stock to co-conspirators Gafni and Schreiber; the true circumstances surrounding the quoting of Allied on the 'pink sheets' by White, Weld & Co. and Laird, Bissell & Meeds; in short, that Hayutin was at no time a party to the conspiracy concerning Allied stock alleged in the indictment." (G7).

Petitioner's motion was accompanied by Mr. Fischer's statement in writing, "I am prepared to have this deposition taken" (G21), and by proof that Mr. Fischer would not attend the trial, refusing to enter the United States while the indictment herein, in which he was named, was pending (G20-21).

The District Court denied the motion without prejudice to renewal within eight days upon submission of an affidavit of Fischer, and Petitioner's undertaking to pay the Government's expenses in attending the deposition (G22-23).

* * *

Under the Court's instructions to the jury, two basic issues were whether the Allied stock sold by Breger, Blistein, Schreiber and Gafni was "control" stock, and whether Petitioner knew it was "control" stock (3594-97;

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* The pertinent papers submitted on this motion, and the order disposing of it, appear as Appendix G to this petition.

see 3566-67, 3625-26).* The charge on the conspiracy count, for example, permitted the jury to convict if it were convinced that Petitioner knew Gafni to be a controlling person (3595).

Gafni testified that at the behest of Breger and Hayutin he signed documents he did not want to sign (1357, 1360); referring to the acquisition by Allied of Tap Records, Inc. and American Stereophonic Corporation, that "They took my office away. Once the deal has [sic] been made on October 20, I left everything to Mr. Hayutin and Mr. Breger" (1478); that after the acquisition was completed he was disturbed at the way Breger and Hayutin were running the business but "I did not handle anymore anything" (1481); that he was just an employee of Allied ("I received a weekly salary from Allied Entertainment as an employer." [1481]); that Breger and the others were ruining his business ("It could not possibly exist, the business, my business, the way they have run it" [1486]); and that he kept asking Dr. Breger and the others "What's happening with the business?" (1487).

* * *

In furtherance of his defense, Petitioner adduced testimony by five witnesses, including a United States District Judge (2099-2106, 2107-12, 2366-70, 2384-2402, 2826-39), not that Petitioner was a person of general good character or reputation for being law-abiding, but that he had a good reputation for veracity (2101, 2108, 2367, 2385, 2827).

On cross-examination, the prosecutor asked two of the witnesses (2105, 2110),

> "Q. Have you heard, sir, that in 1964 Mr. Hayutin was promoting a company called Finch & Coe with one Alfred Lawrence, a man who had been convicted in 1963 of violating the anti-fraud provisions of the Federal Securities laws?"**

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* It was not claimed that Petitioner himself ever "owned or sold any of the control stock" (3595).

** Objections were interposed after both renditions of the question, but sustained only as to the second (2110).

Over objection,* the prosecutor asked four of the witnesses the following question (2103-04, 2109-10, 2367, 2390):

> "Q. Have you heard, sir, that Marvin Hayutin was a business associate of one Joseph Abrams and others in the promotion and illegal sale of approximately four and a half million dollars worth of unregistered Automatic Washer stock in 1955 and 1956?"**

The prosecutor also asked one witness (2103):

> "Q. Now, sir, have you heard that the trustee of Parker Petroleum is suing, among other people, Mr. Hayutin for fraud in connection with Parker Petroleum?"

Reasons for the Allowance of the Writ

1. Vagueness of the Vital Statutory Concept, "Control".

This case presents to the Court the question of the meaning and application of the word "control" as used in Section 2(11) of the Securities Act of 1933. It is a question which is being raised with increasing frequency, not only by those accused of violating the Act but by judges and by practicing attorneys.***

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* The objection was sustained only as to the latter two witnesses (2367, 2390).

** Abrams was prosecuted and convicted for his part in the Automatic Washer transactions. *United States* v. *Abrams*, 357 F. 2d 539 (2nd Cir., 1966), cert. den. 384 U.S. 1001 (1966). Petitioner, however, was not even indicted. And there was no showing that Petitioner had a guilty role in the Automatic Washer scheme. The prosecutor's question, therefore, suggests only that Petitioner was a "business associate" of Abrams, a bad man.

*** See, *e.g.*, *United States* v. *Re*, 336 F.2d 306 (2nd Cir., 1964), cert. den. 379 U.S. 904 (1964); *United States* v. *Wolfson*, 66 Cr. 720 (U.S.D.C., S.D.N.Y.), appeal pending (2nd Cir., Dkt. No. 31993); and authorities cited below.

Under Section 4(1) of the Securities Act of 1933 [15 U.S.C. § 77d(1)], the provisions of Section 5 prohibiting sales of unregistered securities do not apply to transactions "by any person other than an issuer, underwriter or dealer . . .". Section 2(11) of the Act [15 U.S.C. § 77b(11)] defines "underwriter" in relevant part as "any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security . . . "; it provides further that:

> "* * * As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

Since the sales involved here, as in many recent Section 5 cases,* were by individuals, the existence of "control" by the sellers became a major question. And, under the District Court's charge, the jury was required to find that Petitioner knew the selling stockholders were in "control" of Allied before it could convict (3566-67, 3594-97, 3625-26).

The Court of Appeals below disposed of Petitioner's argument on the unconstitutionality of the "control" concept in one sentence (A19), relying on its previous opinion in *United States* v. *Re,* 336 F.2d 306 (1964), cert. den., 379 U.S. 904 (1964), wherein it had succinctly stated that "control" as used in the Act means what it does in "normal everyday usage." 336 F.2d at 316. Since the *Re* case, however, there has been increasing unrest, among those who must deal with the Act, concerning the amorphousness of the term.

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* *E.g., United States* v. *Wolfson,* 66 Cr. 720 (U.S.D.C., S.D. N.Y.), appeal pending (2nd Cir., Dkt. No. 31993); *United States* v. *Abrams,* 357 F.2d 539 (2nd Cir., 1966), cert. den., 384 U.S. 1001 (1966); *United States* v. *Dardi,* 330 F.2d 316 (2nd Cir., 1964), cert. den., 379 U.S. 845 (1964).

"Control" is nowhere defined in the Act and its meaning has never been ascertained by the legal profession. This is illustrated by proceedings at the recent Codification Conference held by the American Bar Association in Chicago in November, 1966. At the Conference, ways were sought to codify the federal securities laws. The former Chairman of the Securities and Exchange Commission, Mr. Ralph H. Demmler, stated in a paper presented to the Conference (Demmler, *Codification*, November 18, 1966, pp. 2-3):

> "Is it really necessary to continue to live with a statute which backs the requirement for registration of the sale of control stock into the law via the hidden alley of Section 2(11)?
>
> "Is it necessary to live with the cumulative uncertainties of determining the existence of control, the existence of a public offering, the length of time required to hold a security for investment so as to terminate one's status as an underwriter?"

The same point was made in a recent article in *The Business Lawyer*:

> "When so much attaches to the identification of a (controlling) person . . . it would be most desirable if the identification could be done with certainty and precision, as, for instance, can often be done under the Internal Revenue Code. Alas, such is rarely the case with key concepts in the structure of federal securities law, and this is particularly true in the case of the concept of 'control'. Like so many key notions the imprecise limits of the term have been limned through the painstaking process of rule, interpretation, judicial decision and ad hoc determinations in 'no action letters'. Out of these there has come no mathematical standard, no slide rule computation, no certain rule which can infallibly guide counsel and client in making this most important determination—a determination which can be costly if wrongly made." Sommer, *Who's "In Control"?* 21 Bus. Law. 559, 562-3 (1966).

And the Hon. Harold R. Tyler, Jr., U.S.D.J., made the following remarks from the bench during oral argument of motions in another criminal case based on alleged violations of Section 5 of the Act:

> "Well, there is another problem here that, you know, interestingly enough, the Chairman of the SEC, a professor of law, all the judges' charges I have ever read, they never know what really is meant by 'control' in this area." (Transcript of oral Argument, *United States* v. *Wolfson*, 66 Cr. 720, U.S.D.C., S.D.N.Y., November 30, 1966, p. 18; appeal pending).

The most recent commentary on the difficulties caused by the "control" concept states:

> "If there are to be restricted sellers, there should be some reasonable certainty in identifying the persons restricted. The present 'control' standard (even as commonly misinterpreted) is too vague to be workable for this purpose. It might be sufficient to limit the group to all or some of the categories of persons covered by the management transaction item of the proxy statement." Schneider, *"Acquisitions Under the Federal Securities Acts—A Program for Reform"*, 116 U. Pa. L. Rev. 1323, 1355 (1968).*

This article concludes that (p. 1357):

> "The law in this area has reached an intolerable level of uncertainty. This uncertainty arises in large part from the failure of the Commission to make known its interpretative positions, and also from the Commission's flexibility (one is tempted to say, inconsistency) in applying its interpretations. We cannot hope to reduce such a complex body of law to a black-letter code as simple to apply as, say, a multiplication table. On the other hand, members of the public attempting to comply with the law are entitled to a somewhat higher order of predictability than that presently obtaining."

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* Publication of this article is expected to be in October, 1968.

The legislative history of the 1933 Act sheds no light upon the problem. The only comment about "control" in that legislative history is in the House Report [H. Rep. No. 85, 73d Cong., 1st Sess. p. 14 (1933)]:

> "The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists."

Thus, the Report describes "control" in terms of "control" itself. Such language provides no useful guide for conduct.*

While the 1933 Act does not define control, certain other securities acts—both state and federal—have been able to define this concept in sufficiently distinct terms to set up a standard to be followed. See, for example, the definition of "control" in Section 2(a)(9) of the Investment Company Act of 1940, 15 U.S.C. § 80a-2(a)(9); the definition of "subsidiary company" in Section 2(a)(8) of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79b(a)(8); and the definition of "controlling person" in Section 2.4 of the Illinois Securities Act of 1953, Smith-Hurd Ill. Ann. Stat. ch. 121½, § 137.2-4. These acts establish a standard which is readily ascertainable. Individuals who may be subject thereto can determine what actions are permitted to them in light of the statutory definition. They need not flounder in undefined areas; they need not make decisions not knowing whether they are indeed subject to the applicable laws.

The Commission's decisions over the past 34 years have also failed to establish a reasonably precise concept of control. For example, the Commission has noted that the

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* Rule 405(f) promulgated under the 1933 Act, 17 C.F.R. § 230.405(f), states that "control" is the "power to direct . . . management and policies . . .". This is no more illuminating than the House Report.

question of control often presents "complicated issues which are not easily susceptible of determination." *Telescript-CBS, Inc.*, Sec. Act. Rel. No. 4644 (1963). The Commission has also stated that the question of control requires "an appraisal of the overall effect of the various factors present in the relationship." *Nev-tah Oil and Mining Company*, 38 S.E.C. 497, 502-03 (1958).

In *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939), this Court said (p. 453):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

And a criminal statute which "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process. . . ." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926).

The Court of Appeals which rendered the judgment below, and which decided *Re*, has itself recognized that since the Securities Act is a criminal statute commanding, rather than prohibiting, certain conduct, it poses special problems. In *United States* v. *Crosby*, 294 F.2d 928 (1961), cert.den. 368 U.S. 894 (1962), reh.den., 369 U.S. 881 (1962), the Court said (294 F.2d at 942):

> "The statutory and administrative regulatory scheme over this area is far from a model of clarity; such a situation is aggravated when, as here, criminal liability is based on the failure to comply with the law."

It is the *Crosby* case which best illustrates the need for a ruling by this Court on the constitutionality of applying

the "control" concept in a criminal prosecution.* There the Court of Appeals, in addition to observing that the law is "far from a model of clarity," considered whether the term "public offering" in Section 4 of the Act is unconstitutionally vague. The Court said (294 F.2d at 952):

> "While the term 'public offering' in the statute alone might possibly be open to an attack on grounds of vagueness, the judicial gloss placed on this legislation by the Supreme Court in *Securities and Exchange Commission* v. *Ralston Purina Co.*, 1953, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494, two years before the acts here charged, cured any defect which might have existed."

This Court has never put any judicial gloss on the term "control" as used in the Securities Act of 1933.** It is submitted that the issue of the meaning of "control" is an important one, not only because of the frequency with which it becomes a problem to practitioners,*** but also because of the consequences to persons, like Petitioner, who are accused of having guessed wrongly.

2. The Creation by the Courts Below of a Radical but Far-Reaching New Rule of Evidence to Justify Depriving Petitioner of the Opportunity to Prove his Defense.

This case presents for review an extraordinary exclusionary rule of evidence, promulgated for the first time in the opinion below, which not only conflicts with rulings of

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* A recent case in which this Court granted certiorari to consider the meaning of a term used in Section 2 of the Securities Act is *SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202 (1967).

** In *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125 (1939), a civil proceeding involving § 2(b) of The Communications Act of 1934, this Court stated that the issue of "control" must be "determined by the special circumstances of each case" (p. 145).

*** See Schneider, *supra*, pp. 1326-27, notes 9-11.

this Court and other Courts of Appeals; which not only had the effect here of preventing Petitioner from fully presenting his defense; but which will hereafter greatly hamper the trial of nearly every litigated case in the Second Circuit.

In upholding the exclusion of the proffered testimony of Brenengan and Cumberland that Gafni and Schreiber had admitted a scheme of implicate Petitioner, the Court of Appeals purported to rely on the "general rule" that (A17)

> "... a prior self-contradictory statement, where used to discredit a witness, is required to be asked of the witness first, in order to give him an opportunity to deny or explain it. The statements sought to be brought out by defense witnesses fell clearly within that rule and on that ground were properly excludable."

But it was plain, and it was urged below, that the testimony was offered, *not* as a prior inconsistent statement and *not* to "discredit a witness", but affirmatively to prove the defense: that Petitioner was the victim of a conspiracy. Thus, when the prosecutor urged at trial that the Cumberland testimony was "indirect impeachment", counsel immediately said (F4):

> "Well, if your Honor please, this is offered on the state of mind of Gafni." *

A few moments later, counsel pointed out (F5-6),

> "The defense here is a conspiracy or counter conspiracy against the defendant."
>
> * * *
>
> "And if Gafni at any time, even if he did it after the trial began, said, 'Well, the whole thing is a frame—'"
>
> * * *

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* That this was the purpose of the offer had also been made quite clear earlier in the colloquy (F4).

> ". . . I think this is in the area of a well recognized exception."

The proffered testimony was, of course, hearsay, and the "well recognized exception" referred to by counsel was the exception to the hearsay rule for out-of-court statements showing the state of mind of the declarant, where such state of mind is relevant to the issues in the case. See, *e.g., Mutual Life Ins. Co.* v. *Hillman,* 145 U.S. 285 (1892) wherein evidence that a man had stated an intention to take a certain journey was held admissible to show that he took the journey, the fact of the journey being at issue. *Accord*: *United States* v. *Annunziato,* 293 F.2d 373, 377 (2nd Cir., 1961), cert.den., 368 U.S. 919 (1961); 6 *Wigmore on Evidence,* § 1725, pp. 79-80 (3rd Ed., 1940).

Neither the Government nor the Court of Appeals took issue with Petitioner's demonstration that a conspiracy against Petitioner could be proved by evidence of the conspirators' intention, and that such intention could be shown by the conspirators' statements. Indeed, no issue could have been taken. The doctrine is settled, and is well expressed in the early case of *Worth* v. *Chicago, M. & St. Ry. Co.,* 51 Fed. 171 (C.C.N.D. Iowa, 1892), wherein the Court said (p. 174):

> "If these parties at the time of the accident had formed the intention of wrecking the train, such intention would be a material fact upon the question whether the train was accidentally or intentionally derailed, and what better evidence of a party's intention can be introduced than his declaration therof?"

Significantly, the Court of Appeals below went so far as to *agree* that the Brenengan and Cumberland testimony was (A16) *"relevant and probative of the defense"* (emphasis added).

But the basis for the Court's decision was that such testimony (A16)

> ". . . *also* brought into issue the veracity of the Government witnesses . . ." (emphasis added).

The Court thus departed from the settled rule, never, so far as we know, questioned in any jurisdiction in recent years, that "the inadmissibility of an evidential fact for one purpose does not prevent its admissibility for any other purpose." 1 *Wigmore, supra,* § 215, p. 711; see *Id.* § 13, p. 300. This Court applied the rule in *Bram* v. *United States,* 168 U.S. 532 (1897), holding that certain testimony was relevant and competent, and that "the fact that it might operate indirectly to fortify the credit of such person as a witness in the cause could not affect its admissibility" (p. 568). See, also, *Shepard* v. *United States,* 290 U.S. 96, 104-05 (1933), wherein this Court listed five examples of hearsay which is admissible for one purpose, but not for another.

The opinion below, in rejecting the rule, makes no mention of *May* v. *Wright,* 62 Wash.2d 69, 381 P.2d 601 (1963), which was relied on by Petitioner, and is indistinguishable from this case on the facts. In *May,* a personal injury action, the issue was whether the injured boy had walked or dashed into the street. Plaintiff's witness, Mrs. Sundgren, testified that she had seen the injured child walk across the street and stop in front of the car before it started. Defendant, although he had not asked a foundation question of Mrs. Sundgren, was permitted to adduce the testimony of a policeman that, when he had appeared at the scene, Mrs. Sundgren had stated that the boy had dashed into the path of the moving car. The Court held that the testimony of defendant's witness was improper as *impeaching* testimony because no foundation question had been asked (62 Wash.2d at 72, 381 P.2d at 603). But the Court then said (*Ibid.*):

> "The fact that evidence is inadmissible upon one ground does not preclude this court from upholding its admission by the trial court if it was properly admissible on another ground."

The admission of the evidence was upheld on the ground that the testimony was relevant to the main issue in the case and fell within the exception to the hearsay rule for spontaneous exclamations.

This principle of "multiple admissibility" is stated by Wigmore to be "indispensable as a practical rule". 1 *Wigmore, supra,* § 13, p. 300. "Our law of Evidence, as a workable system, would be impossible without it." *Id.* § 215, p. 712. For decisions in other circuits which apply the doctrine, see *Carbo* v. *United States,* 314 F.2d 718, 739-42 (9th Cir., 1963), cert. den. 377 U.S. 953 (1964), reh. den., 377 U.S. 1010 (1964); *United States* v. *United Shoe Machinery Corp.,* 89 F.Supp. 349, 355 (D.Mass., 1950).

The pernicious effect of the unprecedented rejection of the rule by the Courts below is obvious. Petitioner was unexpectedly deprived of an opportunity to prove his defense by means of clear, independent testimony.* It is held that the "refusal to hear competent witnesses or competent testimony available is a denial of due process of law." *Gung You* v. *Nagle,* 34 F.2d 848, 851 (9th Cir., 1929). Such a denial is especially clear where, as here, the refusal to hear vital evidence in a criminal case is justified *nunc pro tunc* by the creation, on appeal, of a new and, to the practicing trial lawyer, disturbing rule of law: that evidence inadmissible for one purpose is inadmissible for all purposes.

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* The Court of Appeals hinted, but correctly did not hold, that the Brenengan and Cumberland testimony would have been merely cumulative (A18-19). The only other testimony which might have tended to prove the conspiracy against Petitioner was that of Petitioner himself, Petitioner's brother, and a lawyer whose testimony the prosecutor explained away in summation. Surely the jury would have found it harder to disregard the testimony of the two disinterested witnesses, Brenengan and Cumberland.

This Court should consider the propriety of such a ruling, not only because it is unjust to change the rules *after* a defendant in a criminal case has had his day in court, but also because of the tremendously unsettling effect upon recognized trial practice which is heralded by the holding below. As Wigmore states, "[i]t *constantly* happens" that evidence inadmissible for one purpose is admissible for another. 1 *Wigmore, supra,* § 13, p. 299 (emphasis added).*

We think the departure of the Court below from accepted and usual procedure, and the manner in which it was done, carry with them an implicit threat to the tradition, and constitutional command, that criminal trials be conducted fairly. This Court is asked to extinguish that threat.

3. The Cross-Examination of the Witnesses to Petitioner's Good Reputation for Veracity.

The decision of the Court of Appeals, in sanctioning the prosecutor's cross-examination of Petitioner's reputation witnesses, squarely conflicts with this Court's opinion in *Michelson* v. *United States,* 335 U.S. 469 (1948), and with the opinions of the Court of Appeals for the District of Columbia in *Shimon* v. *United States,* 352 F.2d 449 (1965), and *Josey* v. *United States,* 135 F.2d 809 (1943).

On direct examination, Petitioner's reputation witnesses testified only to Petitioner's good reputation for "honesty and veracity", and not to his general good character. In *Shimon* v. *United States, supra,* it was held that such testimony puts in issue only the defendant's "reputation for veracity". 352 F.2d at 454.

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* And it must be assumed that the Court below will stand by its exclusionary rule in other cases. Should it think better of the rule, should it suddenly retreat, the rule will be seen to have been created for Petitioner alone, an even more flagrant denial of due process and equal protection of the laws.

The cross-examination focused simply on the insinuation that Petitioner was acquainted with evil men. The questions were palpaby improper, not only because of the enormous prejudice to Petitioner inflicted by them,* but because they were contrary to the established rule that such cross-examination must seek to demonstrate only facts inconsistent with the reputation asserted.

In the *Michelson* case, *supra,* this Court said that it is "by comparison with the reputation asserted" that the cross-examination is to be judged, and stated (p. 484):

> "The cross-examination may take in as much ground as the testimony it is designed to verify."

Similarly, in *Shimon* v. *United States, supra,* the conviction was reversed because the prosecutor had failed to "limit the questions to the issue tendered, *i.e.*, Appellant's reputation for veracity . . ." (p. 454). And in *Josey* v. *United States, supra,* it was said that the cross-examination must be confined to "acts inconsistent with the trait of character about which the witness has testified" (p. 811). See also *People* v. *Marsh,* 58 Cal.2d 732, 745 (1962).

The Court of Appeals below dismissed Petitioner's contention by mere citation to *United States* v. *Bilotti,* 380 F.2d 649 (2nd Cir., 1967), cert.den., 389 U.S. 944 (1967), a companion case to this one, wherein the cross-examination of the *present* Petitioner's reputation witnesses was assigned as error by *other defendants.*

The use of reputation testimony in criminal cases has been quite common in recent years, especially in the Second Circuit, and it is becoming apparent that a rule is harden-

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* In another connection, the Court of Appeals for the Second Circuit has observed that it is "one of the most fundamental notions known to our law" that a defendant "is entitled to have his guilt or innocence determined on the specific offense charged and not risk the possibility of conviction for a series of prior specific acts which collectively suggested that his career had been reprehensible." *United States* v. *Beno,* 324 F.2d 582, 587, 589 (1963).

ing in that Circuit which permits virtually unlimited latitude to the prosecution while conflicting with the practice in other circuits.*

We ask the Court now to review that rule.

4. The Refusal to Permit Petitioner to Obtain Important Exculpatory Testimony by Deposition.

This petition presents the question whether the Court of Appeals was correct in holding that Klaus Fischer, whose deposition was sought, would not be "unable to attend or prevented from attending" the trial, within the meaning of Rule 15(a) of the Federal Rules of Criminal Procedure.

Klaus Fischer, a co-defendant,** was a citizen and resident of Germany (A19). He was never arrested on the indictment below and had not come to this country (A19). He refused, however, to come to the United States during the pendency of the indictment against him; this plainly made him unavailable as a trial witness (G12, G20).

Neither the Government nor the Court below denied that Mr. Fischer's testimony was "material" within Rule 15. As counsel stated (G7), Mr. Fischer would have testified that Petitioner had no part in the sale of Allied stock in Europe.

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* Compare *Shimon* v. *United States, supra,* and *Awkard* v. *United States,* 352 F.2d 641 (1965), both decided in the District of Columbia Circuit, not only with the instant case and *Bilotti, supra,* but also with *United States* v. *Wolfson,* 66 Cr. 720 (U.S.D.C., S.D.N.Y.), appeal pending (2nd Cir., Dkt. No. 31993), and with *United States* v. *Giddins,* 273 F.2d 843 (2nd Cir., 1960), cert. den., 362 U.S. 971 (1960), relied on in *Bilotti.*

** This has not been deemed sufficient reason for denial of permission to take a deposition. See, *e.g., United States* v. *Egorov,* 34 F.R.D. 130 (E.D.N.Y., 1963).

> "A showing that the witness whose deposition is sought would tend to exonerate the defendant clearly satisfies the materiality requirement." 8 *Moore's Federal Practice*, ¶15.03[2], p. 15-9 (1968).

But the Court below stated that Mr. Fischer was "unwilling to attend", and that this is "not tantamount to being unable to attend" (A19). Thus a provision created to assist defendants in presenting defenses available to them was twisted to penalize Petitioner for conditions over which he had no control. The Court's ruling left Petitioner with no way at all to bring to the jury testimony which no one has denied was vital to the defense.

Reasoning similar to that applied below is criticized in 8 *Moore's, supra*, ¶ 15.03[1], pp. 15-7, 15-8, commenting on *United States* v. *Soblen*, 203 F.Supp. 542 (S.D.N.Y., 1961). In *Soblen*, the witness, a foreign resident, had refused to enter the United States after his request for immunity from a perjury prosecution for the very testimony sought was denied. For that reason, his deposition was not permitted. The commentator states:

> "The injection of the immunity question seems to have obscured the issue. Had the question of immunity been omitted, it is probable that defendant's absence from the United States and lack of amenability to subpoena would have satisfied the requirement of unavailability."

This Court has never spoken upon the meaning of Rule 15. Its decision of the question here raised will do much to facilitate a constantly increasing number of criminal trials.*

This Court is also asked to consider the manner in which the deposition of Mr. Fischer was denied. The District

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* "The most common reason for seeking depositions in a criminal case is that the witness is a foreign national residing outside the United States and thus cannot be subpoenaed for trial." 8 *Moore's, supra*, ¶ 15.03[1], p. 15-7.

Court purported to deny Petitioner's application without prejudice to its renewal on conditions (G 22-23).* The Court of Appeals said, "[W]e cannot say they were unreasonable, if the deposition was to have any meaning" (A19).**

But one of the conditions, and the one to which Petitioner voiced the most strenuous objection (G 18-19), was that Petitioner pay the expenses of the United States Government in attending the deposition (G 23). How this was to have given the deposition "meaning" is difficult to say.

The suggestion in both courts below that Petitioner should pay these expenses for the Government is not merely unprecedented but somewhat shocking. The District Court's memorandum states that its imposition of this condition was based on an analogy to the practice in civil cases (C1). But this was not a litigation between private parties, and any attempt to weigh the relative burdens, conveniences and resources of Petitioner and the United States Government reduces itself almost to the comic.

Moreover, Rule 15(c) expressly provides for payment by the Government of a defendant's expenses under appropriate circumstances, but contains no suggestion that a defendant may ever be required to pay the Government's. We are aware of no case, rule or statute, and the Government cited none below, which even remotely supports the imposition of such a burden on a defendant in a federal

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* This indicates that the District Court was persuaded that the witness was indeed "unable to attend", else the denial would have been with prejudice.

** The District Court's ruling was also upheld on the ground that it was "doubtful that Fischer was willing and available to submit to deposition" (A19). The Court of Appeals apparently failed to consider Mr. Fischer's last communication on the subject, a letter to Petitioner's counsel, in which he unequivocally stated, "I am prepared to have this deposition taken" (G21).

criminal case. Indeed, even under 28 U.S.C. § 1918(b), which provides for payment by a defendant of the "costs of prosecution", a defendant may only be required to pay such costs after his conviction. The order requiring such payment is part of the sentence. *Barnes* v. *United States*, 223 F.2d 891 (5th Cir., 1955). Its effect is similar to that of the imposition of a fine or penalty.

In contrast, the requirement here that Petitioner pay the Government's expenses was a plain roadblock to Petitioner's preparation for trial. Its imposition made the invitation to renew the motion illusory.

The purpose of Rule 15 was subverted below. This Court is asked to correct the error.

CONCLUSION

For the foregoing reasons Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

JESSE CLIMENKO,
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JESSE CLIMENKO,
MILTON S. GOULD,
MICHAEL LESCH,
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of Counsel.

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 206 and 444—September Term, 1967.

(Argued March 11, 1968 Decided July 29, 1968.)

Docket Nos. 31465 and 32164

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

MARVIN HAYUTIN and LEON NASH,

Defendants-Appellants.

Before:

KAUFMAN, HAYS, *Circuit Judges,* and
RYAN, *District Judge.*

Appeal by Leon Nash following jury verdict of guilty returned on June 25, 1966 in the United States District Court for the Southern District of New York before Harold J. Tyler, Jr., *D.J.*, on five counts, charging in Count 1 conspiracy to make illegal unregistered sales of stock and to use the mails in furtherance of a scheme to defraud in the sale of said stock; in Counts 4 and 5, making unregistered sales of stock in violation of Section 5 of the Securities Act of 1933, Title 15, U. S. C. Section 77(e)(a); and in Counts 22 and 23, making fraudulent sales of stock in violation of Section 17 of the Securities Act of 1933, Title 15, U. S. C., Section 77q; on which sentence was imposed and judgment entered on February 20, 1967.

Appeal by Marvin Hayutin from judgment of conviction upon jury verdict of guilty returned on March 9, 1967 before John M. Cannella, *D.J.*, on each of 14 counts (of the same indictment on which Leon Nash was convicted); which were Count 1, charging conspiracy, and thirteen substan-

tive counts (2, 3, 4, 5, 6, 8, 10, 12, 14, 16, 18, 19 and 21), charging him with aiding and abetting the sale of unregistered stock in violation of Section 5 of the Securities Act of 1933, Title 15, U. S. C., Section 77(e)(a). Sentence was imposed and judgment entered on May 5, 1967.

These two appeals from judgments entered following two separate trials, were consolidated and were heard simultaneously.

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York (Frank M. Tuerkheimer, Paul R. Grand, Pierre N. Leval, Assistant United States Attorneys), *for Appellee.*

CARRO, SPANBOCK & LONDIN, New York, New York (Jerome J. Londin and Allen Green, Esqs.), *for Appellant Leon Nash.*

SHEA GALLOP CLIMENKO & GOULD, New York, New York (Milton S. Gould, Michael Lesch, and Samuel J. Gilbert, Esqs.), *for Appellant Marvin Hayutin.*

RYAN, *District Judge*:

We have here two appeals from judgments of conviction following separate trials, but emanating from the same indictment.

Nash's appeal is from a conviction on five counts after the first trial—on which the jury had disagreed as to Hayutin but convicted 5 other defendants. Hayutin appeals from his conviction on 14 counts after his retrial. Because Nash's sentence had been deferred until February 20, 1967, he did not appeal when his co-defendants did, *United States* v. *Bilotti*, 380 F. 2d 649.[1]

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[1] Whatever may have been the occasion for the delay, it has resulted in the seriatim hearing of appeals, of defendants who were jointly tried and convicted, a procedure which should be avoided.

Appendix A

The indictment filed on March 4, 1965, charged 14 individual defendants in 48 separate counts with violations of the anti-fraud provisions of the Securities Act of 1933 (15 U. S. C. Sec. 77q(a)). The prosecution arose from the public marketing and the unregistered sale of common stock of Allied Entertainment Corporation of America during the period from July 1, 1962 through May, 1963. Nash was sentenced to a year and a day on each count, sentences to run concurrently, and fined $500. Hayutin was sentenced to 2½ years on each of 14 counts, sentences to run concurrently, and he was fined $14,000. Since the appeals are from judgments of conviction following separate trials,[2] we have considered and decided them separately.

Both convictions are affirmed.

The Nash Appeal

Nash was convicted of conspiring to make illegal unregistered sales of common stock of Allied Entertainment Corporation of America, Inc. (Allied) and to use the mails and telephone in furtherance of a scheme to defraud in the sale of the Allied stock (Count 1);[3] making unregistered sales of the Allied stock in violation of Section 5 of the Securities Exchange Act of 1933, 15 U. S. C. 77(e)(a) (Counts 4 and 5); and making fraudulent sales of Allied stock in violation of Section 17 of the Securities Act of 1933, 15 U. S. C. 77(q) (Counts 22 and 23).

These are the facts as they implicated Nash and by necessity Hayutin, which were developed at the trial.

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[2] At both trials, the principal witnesses for the Government were the defendants Schreiber and Gravino, and the co-conspirators Breger and Gafni.

[3] Nash was the only defendant convicted on this count, but three co-defendants pleaded guilty to the count and there were other co-conspirators not named as defendants.

Appendix A

The conspiracy and the subsequent substantive crimes were born of the efforts of two dentists—Breger and Blistein—to rescue Allied, a small popular music publishing business they had formed, from financial disaster due to an earnings deficit accumulated over four years and lack of working capital. The two dentists-turned financial operators were having difficulty selling 60,000 shares of Allied stock which Allied was offering publicly at $2.50 per share pursuant to an exemption from registration under Regulation A of the Securities and Exchange Commission Rules.[4] By August 20, 1962, only 20,000 to 25,000 shares of the total 60,000 shares offering had been sold. Although Reuben Rose & Co., a brokerage firm, was the underwriter, the actual peddling of the stock was done by Breger and his associates. At this time the securities markets were depressed and a partner of the Rose firm informed Breger that, unless an additional 10,000 to 15,000 shares were sold by September 17, 1962, the date of the expiration of the Regulation A offering, the proceeds already realized would have to be refunded. Breger sought help from one Gearhart, a "stock trade" and market manipulator. Gearhart introduced Breger to Hayutin.

Breger related his problems to Hayutin, who then arranged a meeting between Breger and Gravino. It was following this that Gravino approached Nash on the matter. Gravino and Nash were over-the-counter brokers; Gravino was the sole stockholder of Albion Securities Co., Inc., and Nash the sole stockholder of Seaboard Securities Corp. Both of them had had prior dealings with Hayutin.

Gravino told Nash that Hayutin had told him of Breger, of Allied's offering and of the necessity to sell a large num-

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[4] Regulation A (Title 15, Section 77c(b), Securities Act of 1933) exempts certain public offerings of stock of an aggregate offering price not to exceed $300,000 provided such offering complies with the provisions contained in the regulation (17 C. F. R. Sec. 230.251-63).

ber of Allied shares in a short period. Gravino also told Nash that, if he and Nash were to help to sell these shares, they would receive 50 to 75 cents per share in cash over the underwriting commission.[5] Nash told Gravino to arrange for a payoff of $1.25 per share.

On September 2, 1962, there was a meeting at Hayutin's apartment, at which Hayutin, Nash, Breger and Blistein were present. Hayutin made good on the recommendation Gearhart had given Breger that Hayutin "could do the job." Hayutin negotiated a deal. Gravino and Nash undertook to sell approximately 10,000 shares by the close of the offering on September 17, 1962; Breger agreed to pay them a secret cash commission of $1.00 for each share sold, which was to be additional to an offering commission of 25¢ per share, which they were to share with Rose & Co., the underwriters. Gravino and Nash agreed to pay Hayutin 25¢ per share out of what they collected. Gravino and Nash also promised to sell additional shares after September 17, 1962, by which date, Gravino and Nash had sold *7,000 of the 10,000 shares. A meeting was held that day at* Gravino's office, which Hayutin, Gravino, Nash, Breger and Gravino's partner attended. Breger then paid Gravino and Nash $7,000 in cash, to be divided between them, and they paid 25¢ a share or $1750 in cash to Hayutin.

While Gravino and Nash were selling the 7,000 shares of the offering, Gearhart was the principal trader in Allied Stock. He, working with and protected by Breger's promise to buy from him every share he was forced to purchase, maintained an inflated and rigged price for the stock. Nash and Gravino had met with Hayutin, Breger and Gearhart when the details of this rigged bid operation were set, and, in fact, Nash encouraged and policed Gearhart's activities to the extent of offering him a call at $2.50 when Gearhart

[5] The offering circular disclosed a commission of 25 cents a share.

succeeded in raising the price to $4 and reporting him to Hayutin when he failed to maintain the price.

Hayutin's, Gravino's and Nash's connections with Breger's activities and Allied financing did not end with the public offering. Breger had told Hayutin in September, 1962, that even with the underwriting, Allied needed some $50,000 in working capital. Hayutin suggested to Breger and Blistein that, during the offering, they buy 5,000 shares of Allied to help in the success of the offering and that these shares could later be resold through Gravino and Nash. After the close of the offering, Hayutin arranged with Gravino and Nash to have them sell publicly these shares which Breger and Blistein had purchased in nominee names. Gravino and Nash agreed with Hayutin that they would pay him 25¢ for each share so sold and that they would equally divide the balance received from Breger. They undertook the sale of the stock, and Hayutin arranged for its delivery. On October 2, 1962, Breger, Hayutin, Nash and Gravino again met in Gravino's office. Breger had with him the 5,000 certificates for the shares purchased by him and Blistein in the names of the nominees. At Nash's suggestion, the stock of Breger's nominees was sold through Gravino and that of the Blistein's nominees through Nash. Breger had brought no ready cash for the payoff to Nash and Gravino and Hayutin, but this presented no obstacle to their ingenuity. Breger endorsed the name of his nominee to a check payable to her, it was cashed and the proceeds turned over to Nash and Gravino, who, in turn, paid over to Hayutin his 25¢ per share. The remaining nominee shares were later sold by Gravino and Nash, and certificates delivered to them by Breger who paid them off as before. The evidence showed that Nash sold a total of 14,000 Allied shares, receiving payoffs of $15,000.

The unregistered sale of some of this 5,000 lot by Nash's firm to two customers is charged in Counts 4 and 5 to be in violation of Title 15, U. S. C., Sec. 77b(11), d(1) and 3(a),

because they were shares owned by Breger and Blistein "controlling persons" of Allied.

Count 4 charges that on October 1, 1962, Nash sold 100 Allied shares to George F. and Eloise T. Roebrig and used the mails to send them a confirmation of the sale. Count 5 charges Nash with the sale on October 9, 1962 of 300 Allied shares to one Bart Feller, and mailing to him a confirmation.

The stock involved in these sales was registered in the names of Chusid and Pisapia, sisters of Blistein who was a person in control. The Chusid-Pisapia shares were part of the shares which had been purchased by Blistein in the names of his sisters as nominees during the initial Regulation "A" offering.

On these two counts, Nash urges that the evidence was insufficient to convict him in that there was confusion arising from the lawful sales of the Regulation "A" securities through September 17, 1962, and the subsequent alleged unlawful sales of unregistered securities; and that there was insufficient proof that the Blistein stock sold by Nash, part of which he sold as evidenced by the confirmations, was controlled by Blistein and was subject to registration, and that Nash knew this.

Both of these contentions are overwhelmingly refuted by the evidence. The placing of Blistein stock in the hands of nominees for subsequent sale by Nash and Gravino, after the expiration of the Regulation A offer, was part of a plan as to which Nash was a principal actor. Delivery of these certificates was made by Breger, not by the nominees, and it was he who paid Nash his kickback for his successful efforts in their prior sale. The certificates which his two customers received were the certificates held in the names of Blistein's nominees, which Breger had delivered to Nash at Nash's suggestion. The fact that these certificates were delivered to the customer at a later date

than that of the confirmation did not alter the fact that the stock they represented had been sold as evidenced by the confirmation. The subsequent delivery of the certificates did but seal the sale. As for Nash's lack of knowledge that this was control stock, raised in defense, the Court's charge was more than fair to defendant.

Among these sales were the fraudulent sales charged in Counts 22 and 23 carried out by Nash through his operating front, Seaboard Securities Corp., and his salesmen Finkleman and Pollinsky. As to these counts, Nash has argued three assignments of alleged error, none have merit or substance.

Count 22 charged Nash with fraudulently selling to Reverend Arthur Dolge on October 12, 1962, 400 shares of Allied stock at $3.50, a sale effected through Finkleman and confirmed by mail. A previous sale had been made to the Reverend Dolge by Nash through Finkleman on September 5, 1962 of 300 shares at $2.50.

Count 23 charged the fraudulent sale by Nash to a Mrs. Lillian Blum on October 16, 1962 of 100 shares of Allied at $3.50. This sale was made by Nash's salesman Pollinsky; Mrs. Blum, too, received by mail a confirmation of the sale.

Nash's first assignment of error is that the evidence was insufficient to sustain conviction on these fraud counts.

We have pointed out Nash's participation in the market manipulation, maintaining the rigged price of Allied stock and his arranging for and receiving a substantial share of the cash kickbacks of $1.00 to $1.50 per share over and above the disclosed underwriting commission. Nash supervised his salesmen and instructed them to tell purchasers only what was stated in the offering circular. No claim is made that these purchasers were told either of the market manipulations or of the concealed payments made to Hayutin, Gravino, Nash or Gearhart. All that was disclosed in the Regulation A prospectus was the 25¢ com-

mission to the underwriters. Evidence of the concealment of manipulation alone, and certainly combined with concealment of the payments in excess of the amount stated in the offering circular as commission, was sufficient proof of the fraud charged (3 Loss, Securities Regulation, pp. 1560-1561; *Thornton* v. *Securities and Exchange Commission,* 171 F. 2d 702 (2d Cir., 1948); and *Securities Exchange Commission* v. *Torr,* 15 F. Supp. 315, 317 (S. D. N. Y., 1936), rev'd on other grounds 87 F. 2d 446 (2d Cir., 1937)).

The venue argument that there was no proof of actual mailings in the Southern District of New York is answered by the ample circumstantial evidence establishing the mailings in this district. It was shown that both purchasers received the confirmations by mail and that both were residents of the Eastern District of New York. The confirmations, printed on elaborate forms, bear the legend of Seaboard Securities and state its address to be at 80 Wall Street, New York; no other address is given. Its selling activities—by telephone, by mail and in person—were conducted from this address [6] and the mailing from the Wall Street address was in no manner questioned at the trial. Venue was sufficiently established (*Hill* v. *United States,* 284 F. 2d 754 (9th Cir., 1960), cert. den. 365 U. S. 873).

Second, Nash complains that the charge of the Court was erroneous because, over his objections, it was charged that "'a principal is responsible for the crimes of his agent." The general tenor of this contention is that the charge conveyed to the jury the erroneous impression that Nash could be held criminally responsible for misleading representations, made by his salesmen without his knowledge or authorization.

Here, Nash has dissected the charge and, quoting out of context but an isolated portion of it, argues that the in-

[6] Pollinsky invited Mrs. Blum down to the office at that address to persuade her to buy the stock she did.

structions as a whole were erroneous and confusing. The trial judge in his charge recognized that there was no general rule in law which makes a principal criminally responsible for the unauthorized acts of his agents, employees or even of his salesmen, and very emphatically told the jury that it "would have to be convinced beyond a reasonable doubt that the proof shows that the defendant himself dominated and controlled his salesmen, and also knew and was participating in the scheme to defraud or sell Allied by means of fraudulent misstatements or statements"—instructions which were repeated.

Finally, Nash presses as error the Court's refusal to receive testimony of one Roselin Birnbaum which he contends would support his defense that Breger was the source of the false representations. Objection to this testimony by the Government was sustained by the Court on the ground that it was irrelevant, being only remotely collateral. An offer of proof was permitted to be made and rejected. Breger had already testified that Nash and others had conspired with him to defraud the public and he admitted that he had made numerous false representations to the public in furtherance of the conspiracy. The proffered testimony in no way contradicted the Government's contentions or Breger's testimony; it was simply cumulative proof on an uncontested matter.

The attack on the Court's charge on the conspiracy count is unfounded. Judge Tyler made it clear that proof of the substantive counts, if found to have been in furtherance of a conspiracy, might be considered by the jury as overt acts in proof of the conspiracy.

With one exception, the numerous other alleged errors are so petty as to require no discussion. The exception is the point now urged by Nash that Rule 24(c), F. R. Cr. P., was violated when the trial judge refused the defendant's request to discharge the three remaining alternate jurors after the jury had retired to consider its verdict.

Appendix A

The provision of Rule 24(c) that an alternate juror who does not replace a regular juror "shall be discharged after the jury retires to consider its verdict" is a mandatory requirement, as is that of Rule 23(b) providing for a jury of twelve unless a lesser number is stipulated to in writing by the parties. There is no rule providing that the Court, or the parties, may stipulate for a jury of more than twelve, twelve being the magic number (*United States* v. *Virginia Erection Corporation*, 335 F. 2d 868). In the face of the mandatory requirement of Rule 24(c) and the Committee's failure at the time of its adoption to include a proposal to permit an alternate juror to replace a regular juror during the deliberations, it is difficult to understand what purpose is to be served by retaining the alternate jurors once the case has been submitted.[7] The reason advanced by the Government in its brief that this procedure presents counsel with the choice of consenting to a substitution if one of the regular jurors became disqualified "prior to the end of the jury deliberations" rather than face a retrial or proceed with less than twelve, is no reason in the absence of any rule or statute authorizing such consent. *United States* v. *Gottfried*, 165 F. 2d 360, cited by the Government, dealt with the clear right of substituting the alternate prior to submission of the case to the jury.

The prejudice flows from the fact that a defendant runs the risk of being tried by more than the twelve jurors guaranteed to him by the Constitution and the Rule, or of being placed in double jeopardy by being tried by more than one jury (*Patton* v. *United States*, 281 U. S. 276).

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[7] 29 F. R. D. 43.46—Orfield, Trial Jurors in Federal Criminal Cases; Tentative Draft A. B. A. Project on Minimum Standards for Criminal Justice—Trial by Jury—Institute of Judicial Administration, May 1968, *op. cit.*

The absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24.

We turn to the record to see whether in fact, as Nash argues, he ran the risk of having his guilt determined by the three alternates in addition to the regular jurors by reason of the fact that the alternates were in a position to influence the jury in its deliberations.

On this record we can make no such findings. The record shows that the trial judge ruled that three alternates "will have to stay separately" and added "we will have a separate room, and you will be brought back every time the jury itself comes in, if they ever do, to ask any questions and so on." Separate marshals were sworn and assigned for the regular and for the three alternate jurors. Each time during their deliberations that the regular jurors came into the courtroom for further instructions and were seated in the jury box, the alternates were also in the jury box. Nowhere does it appear that they ate in the same restaurant, rode in the same conveyance, or slept in the same hotel.

There is nothing in the trial record which indicates that there was any communication between the regular and alternate jurors after the submission of the case to the jury for verdict. There is no dispute that the record shows that at no time were the alternate jurors in the jury room with the jurors.

On the record before us, we cannot find that defendant Nash was prejudiced by the presence of the alternates. The Government has filed an affidavit by Assistant United States Attorney Grand to supplement the record for the purpose of clarifying the procedure which was followed at the trial of this case. This is not the place for such clarification and we deny leave to make it part of the record, without prejudice to any facts the Government or Nash might wish to develop in some other proceeding.

Appendix A

The Hayutin Appeal

Hayutin was convicted of conspiracy to violate Sections 5 and 17 of the Securities Act of 1933 and of aiding and abetting in illegal unregistered sales of Allied common stock by the other defendants (Counts 1-6, 8, 10, 12, 14, 16, 18, 19 and 21).

Counts 2-6 related to the participation by Hayutin in the sale by Nash and Gravino of the 5,000 shares of Allied stock which had been purchased by Breger and Blistein in the names of nominees during the Regulation A offering. The remaining eight counts related to Hayutin's participation in further sales of blocks of shares of Allied stock, made on a rigged New York market in connection with some merger deals engineered by Hayutin. Having successfully disposed of the 5,000 shares without benefit of registration and anxious to market much larger amounts of the Allied stock, Hayutin proposed that Allied acquire the assets of two corporations—Tap Records, Inc., and American Stereophonic Corporation—controlled by Miklos Gafni, the president. Both corporations were in financial straits. Hayutin introduced Breger to Gafni and proposed the merger, which was to be accomplished by Allied's acquiring the assets of American Stereo in exchange for 69,500 shares of Allied, and the assets of Tap in exchange for 62,500 shares of Allied. For his part in arranging the acquisition, Hayutin was to receive 10,000 shares of Allied, which at the time was selling for over $3 a share.

A large portion of the shares, ostensibly used to acquire those two companies, was in fact retained by Breger and Blistein in the name of Harold Schreiber, a nominee brought into the deal by Hayutin. The stock was "sold" to Schreiber under guise of a sale by his wife of antique tapes and records to Tap in exchange for its stock. The stock held by Schreiber was then sold through kickbacks to various brokers to the public but when the large volume

of the sales in New York made it difficult to maintain the artificially rigged price on the New York market, Hayutin arranged to sell shares in Europe through his business associate Klaus Fischer, Director of the Bankhaus, Schneider & Munzing in Munich.

Hayutin flew to Germany with Schreiber and there agreed with Fischer to have him peddle the stock in Germany at a $1 kickback, Fischer sending the proceeds in cash back to the defendant in New York. In addition, through reputable brokers in New York with whom his bank dealt, Fischer sold $17,700 of these "Schreiber" shares in seven blocks of 500 shares. In order to sell the Allied stock which Gafni had received for American Stereo and Tap upon Hayutin's instructions, Gafni had 24,666 shares of his Allied stock issued or transferred to the names of his wife and relatives. All of this unregistered control stock was subsequently sold to the public. Letters signed by these nominees, claiming all the shares to be exempt from registration, were admitted to have been composed by Hayutin in his handwriting. All the activity came to an end with a collapse of the Allied market. Hayutin's efforts had resulted in the illegal unregistered sale of nearly 50,000 shares of Allied stock, for which up to December 31, 1962 he had received $4250 in cash for his part of the Gravino and Nash sales; a share in the $7500 fee which was paid to Schreiber for the use of his name and his assistance in bringing about the sale of the stock registered to him; and more than 10,000 shares of Allied stock.

Hayutin's counsel concedes that at the trial there was substantially no controversy as to most of the essential facts and that a crime had been committed. He did not argue in defense that the two distributions of Allied stock to the public between September 17, 1962 and the end of May, 1963 were exempt from registration. But he contended, contrary to the Government's contention that Hayutin had

masterminded the criminal plot, that Hayutin was unaware of any wrongdoing; that although a crime had been committed, he had not been a participant; that Breger had been violating the federal securities law long before he ever met Hayutin and that he, Hayutin, had been made the victim of a conspiracy by Breger, Gafni, Schreiber and Gravino to cast all blame upon him. Hayutin also contended that these four conspirators, caught in their wrongdoing, further agreed to falsely testify against him and thus escape just punishment by falsely charging him with being the directing genius of their operations. In connection with this aspect of the defense, Hayutin says that there was error in the trial judge's refusal to receive the testimony of two defense witnesses, which he maintained would have supported his position that he was the victim of a plot by Gafni and Schreiber to inculpate him in order to exculpate themselves; that this testimony was extremely important and relevant to his defense because these two Government witnesses had been called to show that defendant had masterminded the swindle. This evidence was sought to be introduced by the testimony of the two defense witnesses Brenengan and Cumberland. The Government objected and the defendant made the following offers of proof:

As to Brenengan:

> "I offer to prove, your Honor, that in March 1966 Schreiber told this man (Brenengan) that he wasn't worried about the Marketlines letter being closed up because he had some arrangements with the Government about that, that as far as the Allied case was concerned, while Hayutin had nothing to do with the money, they were going to blame it on Hayutin. That is what I offered to prove."

This was later restated by Hayutin's attorney:

> "I offer to prove from him that he met Schreiber in March 1966, that Schreiber told him that he, Schreiber, was not concerned about the Marketlines letter being closed up because he had some arrangements about it with the Government; that he wasn't worried about the Allied case because if the worse came to worse, even though Hayutin had nothing to do with it, he was going to blame it on Hayutin."

As to Cumberland:

> "I offer to prove through this witness, your Honor, that the witness was engaged in some conversations with Gafni during the period February to May, 1963, respecting his, the witness', working for American Stereophonic in some technical capacity; that in late May of 1963 he had a conversation with Gafni and that Gafni told him that there was some trouble about the Allied situation, that that's why he hadn't concluded his arrangements with him, that he was going to be out of the trouble very shortly because he was going to shift all of the blame to Marvin Hayutin; and then the witness said to Gafni. 'Did Hayutin do anything wrong in this case?' And Gafni said, 'No, but he, Hayutin, can take care of himself and I can't, and therefore I am going to put the blame on him.' That's the whole conversation."

This testimony, while relevant and probative of the defense, also brought into issue the veracity of the Government witnesses, whose testimony as we have seen was quite to the contrary, but neither witness, and they were both extensively cross-examined, was confronted with these alleged conversations. It was on this basis that the Government

objected and the Court sustained the objection because Hayutin's counsel was attempting to impeach the witnesses without having confronted them with these prior statements. He was given the opportunity of recalling both witnesses in order to do so but chose not to do so. Counsel argued then and argues now that the testimony was not sought to impeach the witnesses, but to show a state of mind, of bias or hostility, and that such out-of-court statements were relevant on that issue, irrespective of the testimony given on direct examination by the Government witnesses, and thus admissible without reference to their testimony, even if it contradicted it. The general rule is that a prior self-contradictory statement, where used to discredit a witness, is required to be asked of the witness first, in order to give him an opportunity to deny or explain it. The statements sought to be brought out by defense witnesses fell clearly within that rule and on that ground were properly excludable. The rule is not so clear where a "supposed utterance indicating bias" is sought to be used to show bias or prejudice, although Professor Wigmore urges that the same reasons of fairness dictate that the witness be given the opportunity to deny or explain the utterances. (3 Wigmore on Evidence, 3rd ed., Sec. 953; Accord *United States* v. *White,* 225 F. Supp. 514, 519-21 (1963, U. S. D. C.); *Smith* v. *United States,* 283 F. 2d 16 (6th Cir., 1960), cert. den. 365 U. S. 847 (1961).) No case has been cited where the rule was dispensed with where the statement showing bias or prejudice was also self-contradictory of the very testimony being given by the witness. *Comer* v. *Pennsylvania R. Co.,* 323 F. 2d 863 (2nd Cir., 1963) was evidence of an objective fact, tending to show bias, not a contradictory statement of the witness. In *Greatreaks* v. *United States,* 211 F. 2d 674 (9th Cir., 1954) and *Ewing* v. *United States,* 135 F. 2d 633 (D. C. Cir., 1941), cert. den. 318 U. S. 776, the foundation had been laid through cross-examination. Where the statement is self-

contradictory whether it be used to show bias or to impeach, the reason for the rule would seem to be just as strong. (*Burton* v. *United States,* 175 F. 2d 960, 965 (5th Cir., 1949), cert. den. 338 U. S. 909.) In fact, the very reason for counsel's decision not to recall the witnesses was in order not to give them an opportunity to deny the statement attributed to them—and opportunity which the law requires they be given. Whether or not he agreed with the Court, it lay in counsel's power to obtain the admission of this testimony by simply recalling the Government witnesses. That he chose not to do so was clearly the decision of experienced trial counsel who did not anticipate any admissions. Schreiber remained available as a witness and no effort was made to recall him to lay the foundation, it being counsel's position that Schreiber should be called by the Government to give his version of any talk Brenengan might testify he had with Schreiber.

With respect to Gafni, the following colloquy took place:

> "... The Court: If you can get Gafni back here again, and I don't know whether you can—is he in California?
>
> Mr. Gould: That isn't practical. It would hold up the trial.
>
> Mr. Grand: I can get him back, but the government won't pay for his return.
>
> Mr. Gould: I am not going to bring Gafni and have him deny that the conversation took place, your Honor."

Hayutin and his brother Harvey had also testified that Schreiber and Gafni threatened to implicate Hayutin if they were not bought off. Hayutin had been afforded full opportunity to demonstrate Schreiber's and Gafni's attitudes or "states of mind" toward Hayutin, and perhaps he decided

that the testimony of his witnesses would add little. Having made his choice, he should not now urge the "exclusion" of this testimony as error.

Hayutin's second point is that the Court should have directed the taking of the testimony by deposition of the defendant Fischer. Before Hayutin's second trial, he moved for the third time under Rule 15(a), F. R. Cr. P., for an order to take the deposition of Klaus Fischer, a citizen of Germany residing in Munich. Fischer is a defendant named in Count 1 of the indictment. Fischer has never been arrested on this indictment nor has he come to this country. The taking of a deposition, especially on the eve of trial, and the setting of conditions for it, was clearly within Judge Cannella's discretion (*United States* v. *Kelly*, 349 F. 2d 720, 769-70 (C. A. 2, 1965), cert. den. 384 U.S. 947 (1966). He set the conditions and we cannot say they were unreasonable, if the deposition was to have any meaning. It was clearly doubtful that Fischer was willing and available to submit to deposition since he was invoking German law as to his incompetence as a witness and defendant, and the fact that he was unwilling to attend was not tantamount to being unable to attend (Rule 15(a)).

The remaining points on "control" under the Securities Act of 1933 and cross-examination of character witnesses are disposed of by our decisions in *United States* v. *Re*, 336 F. 2d 306 (2d Cir.), cert. den. 379 U.S. 904 (1964), and *United States* v. *Bilotti*, 380 F. 2d 653-654.

The argument that sending a confirmation slip is not a sale is answered by the language of the statute Section 2(10), 15 U. S. C. 77(b)(10); by *United States* v. *Hughes*, 195 F. Supp. 795; and by common sense.

The convictions are affirmed.

APPENDIX B

Judgment of Affirmance of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of July—one thousand nine hundred and sixty-eight.

Present:

HON. IRVING R. KAUFMAN,
" PAUL R. HAYS,
Circuit Judges,
" SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARVIN HAYUTIN AND LEON NASH,
Defendants-Appellants,

ARMAND BILOTTI, *et al.*,
Defendants.

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk

By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

Memorandum Opinion of the United States District Court for the Southern District of New York on Settlement of Order

January 19, 1967.

MEMORANDUM

This proposed order, as amended, is granted.

With respect to the one material difference between the proposed order and the order of this court filed on January 9, 1967, the defendant's position is not well taken.

Rule 5(a) of the Civil Rules of the Southern District of New York provides, with respect to the taking of oral depositions in civil matters pursuant to Rule 30 of the Federal Rules of Civil Procedure, that the proposing party is to pay the expenses for his adversary's attendance at the taking of the oral deposition. As Rule 15 of the Federal Rules of Criminal Procedure was patterned after, and in part incorporates,[1] insofar as not inconsistent, Rules 26 thru 31 of the Federal Rules of Civil Procedure, it would appear that Rule 5(a) of this court's rules is applicable to the instant order.

Accordingly, as the defendant is the party seeking to depose Mr. Fischer, it is he who will be required to bear the expenses involved for the attendance of the Government at the taking of the deposition.

It is so ordered.

/s/ JOHN M. CANNELLA
U.S.D.J.

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[1] Fed.R.Cr.P. 15(d) provides, inter alia, that depositions in criminal matters are to be taken "in the manner provided in civil actions." See also, 8 Moore, Federal Practice ¶ 15.05, at page 15-12, n.4 (2d Ed. 1965).

APPENDIX D

Orders of the United States Court of Appeals for the Second Circuit Denying Petition for Rehearing

#31465 & 32164

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARVIN HAYUTIN AND LEON NASH,
Defendants-Appellants,

ARMAND BILOTTI, *et al.*,
Defendants.

(and another case)

A petition for a rehearing having been filed herein by counsel for the appellant, Marvin Hayutin,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

Before:

HON. IRVING R. KAUFMAN,
" PAUL R. HAYS,
Circuit Judges,
" WILLIAM H. TIMBERS,
District Judge.

[Entered 8/14/68]

Appendix D

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of September, one thousand nine hundred and sixty-eight.

Present:

HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS, *Circuit Judge,*
HON. SYLVESTER J. RYAN, *District Judge.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

MARVIN HAYUTIN and LEON NASH,
Defendants-Appellants,

ARMAND BILOTTI, et al.,
Defendants.

(and another case)

A petition for a rehearing having been filed herein by counsel for the appellant Marvin Hayutin,

Upon consideration thereof, it is

ORDERED that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

APPENDIX E

Constitutional Provision, Statutes and Rule Involved

The Fifth Amendment to the Constitution of the United States, in pertinent part, provides:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law. * * * "

Section 5(a) of the Securities Act of 1933, 15 U.S.C. § 77e(a) provides:

> "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> "(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> "(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Section 4(1) of the Securities Act of 1933, 15 U.S.C. § 77d(1), prior to its amendment in 1964, provided, in relevant part:

> "The provisions of section 77e of this title shall not apply to any of the following transactions:
>
> "(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer, not involving any public offering; . . ."

Appendix E

Section 2(11) of the Securities Act of 1933, 15 U.S.C. § 77b(11), provides:

> "The term 'underwriter' means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

Rule 15(a) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> "If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place."

APPENDIX F

Direct Testimony of and Offer of Proof With Respect to Witness Brenengan

[2077] Q. Now, sir, there came a time when you left Germany and came back to the United States, did there not? A. Yes, sir.

Q. When did you come back, sir? [2078] A. In June 1965.

Q. And after you returned did you see Mr. Harold Schreiber? A. Yes, sir.

Q. When did you see him? A. I saw him several times during the fall of 1965, at his office, and I saw him one time for lunch in early March 1966 when he brought me a new client, a rabbi.

Q. When you saw him in March 1966 did you have a conversation with him? A. Yes, sir.

Q. Would you tell us what that conversation was?

Mr. Grand: March, 1966, your Honor, I object to it. I just don't know on what basis it is coming in and certainly Schreiber was not asked about any conversation with this man in 1966.

Mr. Gould: He is available. He can contradict this, your Honor.

Mr. Grand: Your Honor, we can try the case forever on that basis.

The Court: I know that. Suppose you [2079] step up here.

(At the side bar.)

The Court: What is the offer of proof?

Mr. Gould: I offer to prove, your Honor, that in March 1966 Schreiber told this man that he wasn't worried about the Marketlines letter being closed up because he had some arrangements with the Government about that, that as far as the Allied case

was concerned, while Hayutin had nothing to do with the money, they were going to blame it on Hayutin. That is what I offered to prove.

Mr. Grand: Oh, your Honor—

The Court: I sustain the objection, within my discretion.

Mr. Gould: Your Honor, this is Schreiber, who is the principal accuser here, a co-defendant, a conspirator.

Mr. Grand: And he was not cross-examined about it and there is a very specific rule—

Mr. Gould: He wasn't cross-examined because he didn't know about it at the time.

Mr. Grand: He didn't know about what he said?

[2080] Mr. Gould: Because I didn't know of this conversation.

The Court: I am sustaining the objection with an exception to the defendant, of course.

Mr. Gould: May I get the offer of proof very clearly on the record?

The Court: You did. You put it in. You put it all in.

Mr. Gould: Well, I did not give it in haec verba, as I understand the witness is prepared to give it.

The Court: All right, give it.

Mr. Gould: I offer to prove from him that he met Schreiber in March 1966, that Schreiber told him that he, Schreiber, was not concerned about the Marketlines letter being closed up because he had some arrangements about it with the Government; that he wasn't worried about the Allied case because if the worse came to worse, even though Hayutin had nothing to do with it, he was going to blame it on Hayutin.

The Court: All right.

(In open court.)

Appendix F

Direct Testimony of and Offer of Proof With Respect to Witness Cumberland

[3135] Q. Do you remember the conversation? A. Yes, I do. Mr. Hayutin—

Q. Just tell us what the conversation was.

Mr. Grand: I object to the conversation, your Honor. It is rank hearsay.

Mr. Gould: How it is hearsay?

The Court: It is between the defendant and Gafni.

Mr. Grand: This man is not alleged to be part of any conspiracy, your Honor.

The Court: Assuming he isn't. If he heard something which would be binding on Hayutin, it is certainly allowable.

Mr. Grand: On the contrary, your Honor. Coming in this way, it is a self-serving statement.

Mr. Gould: This man is not on trial. How can it be self-serving?

Mr. Grand: Self-serving through Hayutin.

Mr. Gould: Oh, I can't argue that.

Mr. Grand: If Hayutin had a conversation with Gafni, it is for Hayutin to testify to. It is not for this man to testify to. Hayutin was on the stand. We gave him plenty of opportunity to testify as to conversations he had with Gafni in this period.

[3136] Mr. Gould: If your Honor please, it will soon appear—

The Court: We are discussing a matter of law, so let's get over here.

(At the side bar.)

The Court: It seems to me that the only way you could get this in is if it was an admission—

Mr. Gould: That's exactly what it is being offered for. It is to show Gafni's state of mind in May of 1963.

Mr. Grand: If I may, your Honor, then I suggest to the Court that Mr. Gafni should have been cross-examined about it, and the name of Cumberland was not mentioned to Gafni, and this is indirect impeachment when they haven't confronted the witness himself with it and it is highly improper, and I at least would ask for an offer of proof to see what we are doing.

Mr. Gould: Well, if your Honor please, this is offered on the state of mind of Gafni.

The Court: What is he supposed to have said?

Mr. Gould: He said that certain things [3137] were done and they were done by him and not by Hayutin and he was going to blame Hayutin for them if he got in trouble.

Mr. Grand: Ultimately it is nothing more than an inconsistent statement of Gafni's. That's exactly what it is, and Gafni should have been confronted with it.

Mr. Gould: Not necessarily. If we knew about it. Suppose we didn't know about it?

Mr. Grand: Call Gafni back.

The Court: It seems to me that there should have been a foundation laid for it.

Mr. Gould: It is no different from the Rinzler situation.

Mr. Grand: Gafni was cross-examined about Rinzler.

Mr. Gould: It doesn't make any difference. Are we going to put a premium on when a piece of information comes to our attention?

Mr. Grand: This case is now three and a half years old. It has been tried once before.

The Court: I think it is in a collateral area. It is being offered to indicate a state of mind at the time, and under the circumstances I am [3138] going to exercise my discretion to sustain the objection.

Mr. Gould: Well, your Honor, I simply want to make it clear—

The Court: If you can get Gafni back here again, and I don't know whether you can—is he in California?

Mr. Gould: That isn't practical. It would hold up the trial.

Mr. Grand: I can get him back, but the government won't pay for his return.

Mr. Gould: I am not going to bring Gafni and have him deny that the conversation took place, your Honor.

The Court: You see, the unfairness of it is that you are then in a position of taking last licks in a situation where you shouldn't be, because you should have asked Gafni about this at the time. Had you done that directly—

Mr. Gould: If I had that information, I would have done it.

The Court: If you would have it in the record, then of course there would be no problem here.

Mr. Gould: The defense here is a conspiracy (3139) or counter conspiracy against the defendant.

The Court: I understand that.

Mr. Gould: And if Gafni at any time, even if he did it after the trial began, said, "Well, the whole thing is a frame"—

The Court: Provided you had confronted him with the situation.

Mr. Gould: I don't see why.

Mr. Grand: Because that's the law.

Mr. Gould: Suppose we heard it after he left the stand. I think this is in the area of a well recognized exception. It is not collateral and I think it is seriously prejudicial to the defendant.

The Court: No, I think that I am going to sustain the objection. I have allowed great leeway in an inquiry into the mental condition of these peoeple. I am not going to extend it this far. The objection is sustained.

Mr. Gould: Can we put the offer of proof on?

The Court: Yes, so you have it in the record.

Mr. Gould: I offer to prove through this (3140) witness, your Honor, that the witness was engaged in some conversations with Gafni during the period February to May, 1963, respecting his, the witness', working for the American Stereophonic in some technical capacity; that in late May of 1963 he had a conversation with Gafni and that Gafni told him that there was some trouble about the Allied situation, that that's why he hadn't concluded his arrangements with him, that he was going to be out of the trouble very shortly because he was going to shift all of the blame to Marvin Hayutin; and then the witness said to Gafni, "Did Hayutin do anything wrong in the case?" And Gafni said, "No, but he," Hayutin, "can take of himself and I can't, and therefore I am going to put the blame on him."

That's the whole conversation.

The Court: You say that at that time there were just the two of them there?

Mr. Gould: Yes, sir, just the two of them.

The Court: Hayutin was not there?

Mr. Gould: Hayutin was in the first part of the conversation and left the room.

The Court: It was in Hayutin's apartment?

Mr. Gould: Yes, it was in Hayutin's (3141) apartment.

The Court: All right.

(In open court)

Mr. Gould: I assume your Honor adheres to that ruling, in which case we can excuse the witness.

The Court: Yes. But I want to tell the jury that these are matters of law and the mere fact that I have ruled on this matter of law is not to affect your judgment one way or the other. It has nothing to do with the case at this point because actually this witness has not testified to anything which will help you in your deliberations.

But, as I say, it was all a matter of law and it is a judgment which I made in the case and it doesn't concern your duties at all.

You are excused, Mr. Cumberland.

Mr. Gould: Thank you, Mr. Cumberland.

(Witness excused.)

APPENDIX G

Notice of Motion for Order Directing That the Testimony of Mr. Klaus Fischer Be Taken in Munich, Germany Upon Oral Deposition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 198

UNITED STATES OF AMERICA,

Plaintiff,

against

MARVIN HAYUTIN,

Defendant.

Sir:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Milton S. Gould, sworn to on December 30, 1966, and all the proceedings heretofore had herein, the undersigned will move this Court at a part to be held before Honorable John M. Cannella, United States District Judge, at the United States Court House, Foley Square, New York, New York, Room 1001 on the 6th day of Janary, 1967 at 2:15 o'clock in the afternoon or as soon thereafter as counsel can be heard, for an order pursuant to Rule 15(a) of the Federal Rules of Criminal Procedure, directing that the testimony of Mr. Klaus Fischer be taken in Munich, Ger-

many, upon oral deposition; and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
December 30, 1966

Yours, etc.

SHEA GALLOP CLIMENKO & GOULD

By /s/ MILTON S. GOULD
A Member of the Firm

Attorneys for Defendant
Office & P. O. Address
330 Madison Avenue
New York, New York 10017

Appendix G

Affidavit of Milton S. Gould in Support of Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Cr. 198

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON S. GOULD, being duly sworn, deposes and says:

1. I am a member of the firm of Shea Gallop Climenko & Gould, attorneys for defendant Hayutin in the above action. I make this affidavit in support of the defendant's motion for an order pursuant to FRCP Rule 15(a), directing that the testimony of Klaus Fischer, a citizen and resident of Germany, be taken in Munich, Germany upon oral examination so that defendant Hayutin may be afforded the opportunity to defend against the charges in the indictment and to prevent a failure of justice.

2. The original indictment herein named Hayutin in every one of its forty-eight (48) counts, charging him with twenty (20) counts of aiding and abetting violations of the registration provisions of the Securities Act of 1933 (15 U.S.C. § 77e(a)(1) and 77x; 18 USC § 2), with twenty-seven (27) counts of aiding and abetting violations of the anti-fraud provisions of the Act (15 U.S.C. 77q and 77x; 18 USC § 2) and with conspiracy to violate such provisions. Shortly prior to the first trial herein, the Government severed nine of the counts and, at the close of the Govern-

ment's case, all thirteen of the remaining counts charging Hayutin with aiding and abetting violations of the anti-fraud provisions of the Securities Act of 1933 were dismissed by the court. At the close of the trial, the jury failed to reach a verdict as to the conspiracy count or any of the twelve open counts charging Hayutin with violations of the registration provisions of the Act.

3. Thus, of the forty-eight counts originally in the indictment, Hayutin is to be tried on only count 1, the conspiracy count, and counts 2 through 6, 8, 10, 12, 14, 16, 18, 19 and 21. The testimony which Mr. Fischer can give relates directly to the conspiracy count and counts 8, 10, 12, 14, 16, 18, 19 and 21. In his summation at the prior trial, the prosecutor showed why. He stated (Transcript, pp. 7062-7066):

> "You recall back in the Fall of 1962 a high percentage of shares of Allied were held by people to whom Breger and Blistein had sold the stock during the Reg. A. These people, parents, relatives and friends, could fairly be relied upon to hold onto their shares or that only a minimum had to be repurchased or resold. Now, however, with the distribution aimed at members of the public at large, the percentage of shares held by persons who could be counted on to keep them dropped dramatically. As a consequence, the number of shares that had to be repurchased or resold increased, and each repurchase or resale cost the insiders cash.
>
> "It is with this in mind that we can understand a conversation in Hayutin's apartment among Hayutin, Breger and Schreiber some time in mid-February. Breger stated there was a serious problem with respect to "back dooring", a term used to refer to the

re-emergence of stock on the market which had already been sold and the resale of which cost large sums of money. It was suggested, Schreiber was unsure whether Breger or Hayutin suggested it, that the stock be sold in Europe. Hayutin observed that the securities laws in Germany were years behind those of the United States and that there was a pattern in Europe that when stock was sold it rarely came back on to the market. Thus the insiders decided on utilizing the European market.

"Schreiber and Hayutin went to Munich in early March. There they met Klaus, Fischer, Manager of Schneider & Munzing. During a series of meetings that took place over the ensuing days it was agreed between Fischer, Hayutin and Schreiber, that Schneider, Munzing, of which Fischer was the manager, would sell Allied in Germany. Fischer was to receive everything he netted above $2.50 per share. Fischer was given a power of attorney over Schreiber's Stuart Street accounts at Schneider and Munzing so he could withdraw his payments. It was also agreed that packages of cash would be sent to Schreiber if it was specifically requested over the telephone.

"In addition, Fischer agreed to sell Allied in the United States through Laird Bissell & Meeds and White, Weld & Company, member firms of the New York Stock Exchange at which Schneider & Munzing had accounts. Those sales, however, were to be for the account of Schneider & Munzing and all relevant matters with respect to them were to be handled from the German end, even though the shares were sold in the United States. Fischer also said he would get Laird Bissell to quote Allied in the pink sheets.

"Fischer, Hayutin and Schreiber also agreed that with the funds on deposit from the sale of Stuart Street stock Schneider & Munzing would trade Ger-

man securities. In short, the proceeds from the sales were to form a trading account in Germany, the profits of which Hayutin and Schreiber had previously agreed to share on an equal basis.

"Finally, a procedure was arrived at whereby Schreiber would exchange checks payable to Stuart Street for sales in the United States. He would exchange those for certified back checks and then send those on to Schneider & Munzing where secrecy rules obtained.

"I don't think I need delve into this point, that is, the series of deposits and withdrawals that accompanied and followed the trip to Europe. Schreiber's testimony on this point is more than corroborated by the exhibits in evidence, and if you have any doubts you look at Government's Exhibit 93 through 99.

"When arrangements had been made in Munich Schneider, Munzing also proved successful in another way in that Laird, Bissell almost immediately began to buy and sell Allied for the account of Schneider, Munzing and appear in the pink sheets placing offers and bids as Fischer had said they could. All together Laird, Bissell sold 3200 shares of Allied for the account of Schneider & Munzing in the United States. Some of these sales and one sale of the Stuart Street stock by J. Brad David form the subject of the Section 5 charges here in Counts 8, 10, 12, 14, 16, 18, 19 and 21."

4. Thus the Government's contention is that Hayutin helped Schreiber sell control stock in Germany; that he knew that sales of any such stock in the United States would have to be registered; that it was "agreed" that Schneider Munzing would resell such shares in the United States through Laird Bissell & Meeds and White Weld who would

also quote Allied in the pink sheets; that the proceeds from the sales were to form a Schneider-Munzing trading account in which Hayutin and Schreiber would share equally; and that Hayutin set up the procedure and directed transfers of such funds to the United States. Also, annexed hereto marked "Exhibit A" are portions of the prior trial transcript containing such testimony by Government witnesses.

5. Mr. Fischer will be able to tell the true circumstances surrounding these events; namely that Hayutin made no arrangements with respect to the sale of Allied shares in Germany; that he was never part of a group seeking to sell Allied shares; that in March 1963, Hayutin was in Munich on business entirely unrelated to Allied Entertainment; that Hayutin never had any control over or rights in the Stuart Street accounts; that Hayutin never directed him to give money constituting proceeds of the sales of Allied stock to co-conspirators Gafni and Schreiber; the true circumstances surrounding the quoting of Allied on the "pink sheets" by White Weld & Co. and Laird Bissell & Meeds; in short, that Hayutin was at no time a party to the conspiracy concerning Allied stock alleged in the indictment.

6. Fischer's testimony may thus constitute the vital element of Hayutin's defense. This has been recognized by Government counsel from the outset. I am advised that two government attorneys visited Mr. Fischer and questioned him prior to the first trial herein. When they were unsuccessful in obtaining the expected testimony, the United States Attorney's office caused Mr. Fischer's then attorney, Justin Feldman, to send a letter containing ten suggested lines of testimony which they believed Mr. Fischer would be able to supply. When Mr. Fischer refused to testify as requested, all further attempts by the Government to induce him to come to the United States were dropped.

7. In January, 1966, prior to the first trial herein, a motion was made to take Mr. Fischer's deposition. At that time, the motion was denied by the following memorandum:

> "Assuming it is timely made, this motion to depose co-defendant Klaus Fischer in the State of Bavaria is nonetheless denied. With due respect to the opinions of able counsel for the moving defendant Hayutin, there have been shown no facts to convince this court that there will be a miscarriage of justice without such a deposition. Although defense counsel may turn out to be correct in his surmise that Fischer will not appear at trial, this has not been proved as a matter of fact. Moreover, it has not been shown that Fischer has consented or will consent to being deposed in Munich or elsewhere.
>
> "It is so ordered."

Thereafter, by notice of motion dated February 10, 1966, the defendant renewed his application for an order directing that the testimony of Mr. Fischer be taken and such motion was also subsequently denied. At the time of oral argument of this motion, we will submit to the Court copies of all affidavits submitted in support and in opposition to such motions which affidavits we hereby incorporate by reference.

8. None of the grounds which prompted denial of the motion prior to the original trial obtain now. In view of the Government's contentions at the first trial which we have quoted at length, the specific testimony of Mr. Fischer, the counts to which it relates and its vital importance to the defense have all been made transparently clear. Nor can there be any reasonable doubt that Mr. Fischer would be willing to be deposed in Munich in view of his statement

(made after the above-quoted decision) that: "I do agree that I am morally obliged to testify. . . ." And of course, the clearest evidence that Fischer will not appear for the forthcoming trial is that he did not attend the last trial.

9. The taking of this deposition will in no way delay the trial now scheduled to begin February 6, 1967. The deposition of Fischer may not reasonably be expected to require more than two days and, in all probability, will be completed in a few hours. An attorney from my office would be prepared to leave the United States for Munich on the shortest notice. Thus, I have no reason to doubt that, allowing for a reasonable time for the Government's attorneys to prepare for the trip, the examination could be concluded prior to the last week in January.

10. All criteria prerequisite to granting of a motion for the taking of a deposition pursuant to Rule 15(a) are present. Principally, the witness's testimony is highly material, his deposition is vital to the defense and necessary in order to prevent a failure of justice. In addition, the witness has shown not merely his consent but his desire to be deposed.

WHEREFORE, it is respectfully requested that defendant's motion be granted.

MILTON S. GOULD

(Sworn to December 30, 1966.)

Appendix G

Affidavit of Paul R. Grand in Opposition to Motion

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:
SOUTHERN DISTRICT OF NEW YORK

PAUL R. GRAND, being duly sworn, deposes and says:

1. I am the Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York in charge of the above-captioned case, and, as such, am familiar with the facts and prior proceedings herein. I submit this affidavit in opposition to defendant Hayutin's motion pursuant to Rule 15(a), Federal Rules of Criminal Procedure, to take the oral deposition of co-defendant Klaus Fischer in Munich, West Germany.

2. With the filing of his present papers, Hayutin makes the same motion for the third time. Hayutin's original motion was denied by Honorable Harold R. Tyler, on January 24, 1966, in the following language:

> "Assuming it is timely made, this motion to depose co-defendant Klaus Fischer in the State of Bavaria is nonetheless denied. With due respect to the opinions of able counsel for the moving defendant Hayutin, there have been shown no facts to convince this court that there will be a miscarriage of

> justice without such a deposition. Although defense counsel may turn out to be correct in his surmise that Fischer will not appear at trial, this has not been proved as a matter of fact. Moreover, it has not been shown that Fischer has consented or will consent to being deposed in Munich or elsewhere."

Hayutin's second application was denied by Judge Tyler on March 30, 1966, as follows:

> "Upon this renewed motion to depose co-defendant Fischer in the State of Bavaria, West German Republic, I discern nothing in the papers or upon oral argument to constrain me to depart from the conclusion reached in the memorandum decision of this Court dated January 24, 1966."

3. In short, Judge Tyler has held that Hayutin's applications have failed to satisfy *each* of the three requirements upon which Rule 15(a) conditions the granting of the relief sought, namely:

(1) that co-defendant Fischer is unable to attend or prevented from attending the trial;

(2) that co-defendant Fischer has consented to being deposed; and

(3) that "a failure of justice" will result if Hayutin's application is denied.

4. Hayutin's present application in no material way differs from his prior two and thus offers no reason for this Court to depart from Judge Tyler's earlier decisions in this matter.

5. The requirement of Rule 15(a) that it appear that "a prospective witness may be unable to attend or pre-

vented from attending a trial or hearing" continues to be ignored by Hayutin. He simply asserts "the clearest evidence that Fischer will not appear for the forthcoming trial is that he did not attend the last trial." Not one word is said from which this Court could infer that Fischer is "unable to attend" or "prevented from attending the trial". To the contrary, the earlier applications demonstrate that Fischer is perfectly *"able"* to attend the trial but refuses to do so for his own reason. Fischer is a German National residing in Munich, Germany. He is named defendant in 7 pending counts of Indictment 65 Cr. 198 and has not submitted himself to the jurisdiction of this Court. Two letters from Fischer attached to Hayutin's second application for relief state, in the first, "I have not yet finally decided whether I will come to the United States for the trial or not" and, in the second, "As long as the indictment against me is not withdrawn I am not willing to go to the United States. . . ." Thus, Fischer himself admits he is able to attend the trial but refuses to do so. To authorize his deposition under these circumstances would effectively nullify the clear language of Rule 15(a).

6. To satisfy the need for a factual showing that the prospective deponent consents to being deposed, Hayutin offers no new evidence. Instead he relies on the following evasive statement from the first of the Fischer letters attached to Hayutin's second application, "I do agree that I am morally obliged to testify. . . ." Surely Fischer's appreciation of his moral responsibilities is not equivalent to a consent to be deposed. But even if it were so considered, it lacks reliability. Not even this vague statement is made under oath as is required. Furthermore the Fischer letters demonstrate neither willingness nor authority on his part to produce and make available to this Court the records of Bankhaus Schneider & Munzing relating to accounts in the name or for the benefit of Marvin Hayutin, Harold

Schreiber and Stuart Street Company, without which his deposition could have no value. Moreover, there should be some showing that—assuming this Court were inclined to grant the relief requested—it would not be engaging in the idle exercise of judicial power. Fischer's second letter states that his deposition in Germany could not be accomplished under local law as he "cannot be a defendant and witness at the same time." He then suggests the indictment against him should be withdrawn. The indictment against him has not been withdrawn and, therefore, on the basis of the information available to the Court, it appears that Fischer's deposition could not be taken in Germany.

7. Finally, the Fischer letters demonstrate that, far from preventing an injustice, the taking of his deposition in Germany will encourage just that. By conditioning his appearance in the United States upon a withdrawal of the indictment against him (paragraph 5 *supra*), Fischer has effectively foreclosed the trustworthiness of any information he would give at a deposition. What Fischer is effectively saying is that he is unwilling to have the validity of his defense to the charges determined in a meaningful context. To authorize the taking of his deposition under these circumstances is to enable him to benefit from his fugitive status and encourage other fugitives to remain beyond the jurisdiction of this Court.

WHEREFORE, it is respectfully submitted that the within application should be denied in all respects.

/s/ Paul R. Grand
PAUL R. GRAND
Assistant United States Attorney

(Sworn to January 6, 1967.)

Appendix G

Notice of Settlement of Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

(Filed January 19, 1967)

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE, that the within order will be presented for settlement on the 13th day of January, 1967, before Honorable John M. Cannella, United States District Judge, at Room 1001 of the United States District Court for the Southern District of New York.

Dated: New York, New York
January 11, 1967

Yours, etc.,

SHEA GALLOP CLIMENKO & GOULD
Attorneys for Defendant
330 Madison Avenue
New York, New York 10017

To:

ROBERT A. MORGENTHAU, Esq.
United States Attorney for the
Southern District of New York
Attorney for Plaintiff
United States Court House
Foley Square
New York, New York

(MEMO ENDORSED)

Appendix G

Proposed Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A motion having been made herein pursuant to Rule 15(a), Federal Rules of Criminal Procedure, for an order granting the taking of the oral deposition of Mr. Klaus Fischer, and said motion having duly come on to be heard before Hon. John M. Cannella, United States District Judge, and after reading the Notice of Motion dated December 30th, 1966, the affidavit of Milton S. Gould, sworn to December 30, 1966 in support of the motion and the affidavit of Paul R. Grand, sworn to January 6, 1967, in opposition thereto, and after hearing Shea Gallop Climenko & Gould, attorneys for the defendant Marvin Hayutin by Michael Lesch in support of the motion, and Robert M. Morgenthau, United States Attorney for the Southern District of New York, by Paul R. Grand, Assistant United States Attorney, in opposition thereto,

Now, on motion of Robert M. Morgenthau, United States Attorney for the Southern District of New York, attorney for the United States of America, it is

ORDERED AND ADJUDGED that the motion of the defendant Hayutin to take the oral deposition of the codefendant Klaus Fischer is hereby denied without prejudice to renewal, within eight days from the date of this order, upon the submission by codefendant Klaus Fischer of an affidavit

sworn to before the United States Consul in Munich, Germany stating:

(1) Klaus Fischer consents to the taking of his oral deposition at the offices of the United States Consul before said Consul and to the production and copying, to the extent he is able and authorized, of all books and records relating to this case in his possession, custody, or control or that of the Bankhaus Schneider-Munzing relating to accounts of any nature in the name of or for the benefit of Marvin Hayutin, Harold Schreiber, Stuart Street, Stuart Street Company or Miklos Gafni;

(2) Klaus Fischer consents that said deposition will be given under oath;

(3) Klaus Fischer consents to answer all questions relating to this case put to him either by counsel for the defendant Hayutin or by counsel for the United States of America and will not refuse to answer any question on the ground of self-incrimination.

Dated: New York, New York
January 13th, 1967

JOHN M. CANNELLA
U.S.D.J.

Appendix G

Affidavit of Michael Lesch in Support of Proposed Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MICHAEL LESCH, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Shea Gallop Climenko & Gould, attorneys for defendant Marvin Hayutin in the above entitled matter. I make this affidavit in support of the proposed order submitted herewith.

2. On or about January 9, 1967, an order was submitted by counsel for plaintiff without any notice to defendant's attorneys despite the following provision of Rule 14 of the General Rules of this Court: "Unless the form of order, judgment, or decree is consented to in writing, or unless the Court otherwise directs, two days' notice of settlement is required." No consent, written or oral was given and no direction dispensing with the required notice was given by the Court.

3. The annexed order differs from that submitted by the Government in the following respects:

(a) Fischer's consent to the production and copying of books and records is further limited to those books and records that relate to this case. The Government should

not have a warrant to rove at will through the books and records of Bankhaus Schneider-Munzing which have no bearing on this case.

(b) The provision requiring Fischer to consent to answer all questions is similarly modified so as to require him to answer only such questions as relate to this case. This modification is inserted for the same reason as modification (a) referred to hereinabove.

(c) The provision requiring Marvin Hayutin to bear "all costs and expenses incurred" by counsel for the Government has been omitted for reasons set forth immediately hereinafter.

4. Mr. Marvin Hayutin should not be required to pay the expenses of Government Counsel in order to obtain the requested deposition. Rule 15(a) provides that for a defendant to obtain deposition he must show only the following:

> "... (1) that it appears that a prospective witness may be unable to attend or prevented from attending the trial or hearing; (2) that the witness' testimony is material; and (3) that it is necessary to take his deposition 'in order to prevent a failure of justice.'" 8 Moore's Federal Practice (1966 ed.) ¶ 15.02.

There is no provision in Rule 15 requiring an accused defendant to pay the expenses of Government Counsel in order to obtain a deposition. The only portion of Rule 15 relating to payment of expenses is subdivision (c) and this provides that under certain circumstances the Government is required to pay the expenses of a defendant's attorneys for attendance at a deposition. Referring to rules of the Federal Rules of Criminal Procedure enabling the accused

to obtain evidence which may tend to exonerate him, the Court of Appeals has stated: "Although these rules have different functions and applications, they serve a related purpose: to enable the accused to meet the charges presented against him. They should be liberally interpreted to carry out this purpose." *United States* v. *O'Connor*, 230 F2d 466, 476 (Second Cir. 1956).

5. So that the record of this motion will be complete, annexed hereto marked Exhibit A is a copy of a letter to me from Klaus Fischer dated January 3, 1967 which was handed up to the Court on oral argument of this motion.

WHEREFORE, it is respectfully requested that the annexed order be signed.

/s/ MICHAEL LESCH

Sworn to before me, this
11th day of January, 1967.

/s/ RICHARD J. KLARITCH
RICHARD J. KLARITCH
Notary Public, State of New York
52-7286850 Qual. in Suffolk Co.
Certificate filed in New York County
Commission Expires March 30, 1968

Appendix G

"Exhibit A", Annexed to Foregoing Affidavit

EXHIBIT A

SCHNEIDER & MÜNZING
BANKHAUS
Gegründet 1830
Telefon: 225361
Fernschreiber: 05/23209
Telegr.-Adr.: Schneidmünz
Girokonto: Landeszentradbank München 6/45
Postcheckkonto: München 78

8 München, den 3rd January 1967
Salvatorplaz 2, Eingang Salvatorstrasse
Postfach München 1, Nr. 225
1/me/3

Messrs.
Shea Gallop Climenko & Gould
330 Madison Avenue
New York, N. Y. 10017

Attention: Mr. Michael Lesch

Dear Mr. Lesch,

Referring to your letter dated 30th December I want to make the following comments: I was advised by our lawyer, Mr. Feldman, by his letter dated 24th May 1966 that the US-Attorney was no longer interested in obtaining my testimony in the matter, in view of the availability of Mr. Schreiber's testimony. Furthermore I can inform you that neither the SEC nor the US-Attorney have approached us since almost 1½ year. I, therefore, cannot see any advantage for anybody to attend the trial mentioned in your letter. As you and your client very well know, an attendance

on my part at the trial would involve a written statement by the US-Government that I can come to the USA and leave them without interference. Furthermore it would involve the payment of all costs for the trip and the stay.

If you and your client feel that a deposition taken in Munich would clarify the whole matter as far as we are concerned, I am prepared to have this deposition taken. In this connection I wish to refer to my letters of 1st and 8th February 1966 to Mr. Gould.

Neither the bank nor I have ever given permission to use the letter of Mr. Feldman dated 18th November 1965, and we cannot see any reason to give this permission now. We refer to our letter dated 8th March 1966 to Mr. Marvin Hayutin which expressly stated that neither he nor anybody else is authorized to use the fotostatic copy of the mentioned letter in any way whatsoever.

Truly yours,

/s/ KLAUS J. FISCHER
Klaus J. Fischer

Appendix G

Order Denying Motion for Taking Deposition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

A motion having been made herein pursuant to Rule 15(a), Federal Rules of Criminal Procedure, for an order granting the taking of the oral deposition of Mr. Klaus Fischer, and said motion having duly come on to be heard before Hon. John M. Cannella, United States District Judge, and after reading the Notice of Motion dated December 30th, 1966, the affidavit of Milton S. Gould, sworn to December 30, 1966 in support of the motion and the affidavit of Paul R. Grand, sworn to January 6, 1967, in opposition thereto, and after hearing Shea Gallop Climenko & Gould, attorneys for the defendant Marvin Hayutin by Michael Lesch in support of the motion, and Robert M. Morgenthau, United States Attorney for the Southern District of New York, by Paul R. Grand, Assistant United States Attorney, in opposition thereto,

Now, on motion of Robert M. Morgenthau, United States Attorney for the Southern District of New York, attorney for the United States of America, it is

ORDERED AND ADJUDGED that the motion of the defendant Hayutin to take the oral deposition of the codefendant Klaus Fischer is hereby denied without prejudice to renewal, within eight days from the date of this order, upon the submission by codefendant Klaus Fischer of an affidavit

sworn to before the United States Consul in Munich, Germany stating:

(1) Klaus Fischer consents to the taking of his oral deposition at the offices of the United States Consul before said Consul and to the production and copying, to the extent he is able and authorized, of all books and records relating to this case in his possession, custody, or control or that of the Bankhaus Schneider-Munzing relating to accounts of any nature in the name of or for the benefit of Marvin Hayutin, Harold Schreiber, Stuart Street, Stuart Street Company or Miklos Gafni;

(2) Klaus Fischer consents that said deposition will be given under oath;

(3) Klaus Fischer consents to answer all questions relating to this case put to him either by counsel for the defendant Hayutin or by counsel for the United States of America and will not refuse to answer any questions on the ground of self-incrimination.

(4) The defendant is to pay the expenses for the Government's attendance at the taking of the deposition of Klaus Fischer.

Dated: New York, New York
January 13th, 1967

/s/ JOHN M. CANNELLA
U.S.D.J.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 567 ~~Misc.~~

LEON NASH,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME J. LONDIN
Counsel for Petitioner
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New York, N.Y. 10016

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No._____Misc.

LEON NASH,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, LEON NASH, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on July 29, 1968.

OPINION BELOW

The United States Court of Appeals for the Second Circuit affirmed the judgment entered against petitioner in the United States District Court for the Southern District of New York. This opinion of the Court of Appeals has not yet been officially reported; a copy thereof is appended to this petition as Appendix A. The order of the United States Court of Appeals on petitioner's motion to remand and to stay issuance of the mandate has not been officially reported; this order was entered on September 6, 1968, and a copy thereof is appended to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on the 29th day of July, 1968.

No application has been made for a rehearing in the United States Court of Appeals. On August 30, 1968 the Supreme Court of the United States (Mr. Justice Harlan) granted petitioner an extension to file a petition for a writ of certiorari to and including September 27, 1968.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's rights under Rule 24, Federal Rules of Criminal Procedure, were violated when the District Court refused the defense request to discharge the alternate jurors after the case was submitted to the jury, and the alternates then sat with the jury in the jury box during the jury's numerous returns to the Court for further instructions; and whether the Court of Appeals erred in holding that petitioner who was of necessity apart from the jurors during their three days of deliberations was required to show further commingling with the alternates during meals, at the hotel, or while being transported to and from Court.

2. Whether the District Court erred in giving an exaggerated, extreme version of the Allen charge in which it referred to the added expense of a re-trial and tried to pressure the one hold-out juror.

3. Whether the District Court erred when, after setting a deadline for the jury, it received a partial verdict about midnight on the third day of jury deliberations, when the jury's frame of mind was one of indecision instead of discharging the jury or permitting it to rest and resume the next morning as the defense requested.

4. Whether the District Court erred in instructing the jury that a defendant's testimony was to be considered in the light of his interest in the outcome of his case.

5. Whether the District Court erred

in informing the jury that it had denied petitioner's motion for acquittal.

STATUTORY PROVISIONS

Sixth Amendment to the United States Constitution

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

Article 3, Section 2, Clause 3 of the United States Constitution

> "The trial of all crimes, except in Cases of Impeachment, shall be by Jury. . . ."

Rule 24(c) of the Federal Rules of Criminal Procedure

> ". . . Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties . . . An alternate juror who does not replace a regular juror shall be discharged after

the jury retires to consider its verdict."

STATEMENT OF THE CASE

An indictment in 48 counts, naming 14 defendants, was filed on March 4, 1965. Petitioner was named in 5 counts which charged him with: (1) conspiring with the other named defendants and co-conspirators to make unregistered sales of the common stock of Allied Entertainment Corporation of America, Inc. (hereinafter "Allied"), and to use the moneys and instruments of interstate commerce in furtherance of a scheme to defraud in the sale of said stock; (2) making unregistered sales of the common stock of Allied in violation of Section 5 of the Securities Act of 1933, Title 15, United States Code, Section 77e(a); and (3) making fraudulent sales of Allied stock in violation of Section 17 of the Securities Act of 1933, Title 15, United States Code, Section 77q.

The trial commenced on April 18, 1966, and on June 25, 1966 the jury returned guilty verdicts on all counts as to petitioner. On February 20, 1967, petitioner was sentenced to imprisonment of a year and a day on each count, the sentences to run concurrently and he was fined $100.00 on each count, for a total fine of $500.00.

After hearing the defense motions at the close of the Government's case out of the hearing of the jury, the Court informed the jury that it had denied the motions of

petitioner (17a)*. The Court also stated to the jury that it had acquitted co-defendant Alexander Scheftel and that it had acquitted co-defendant Marvin Hayutin on 15 courts (16a-17a).

During the trial petitioner testified in his own defense. The Court instructed the jury that "in our law there is a presumption that unless and until determined by you to be outweighed by the evidence to the contrary, a witness speaks the truth" (57a). The Court further instructed the jury that in weighing credibility it had the "right and obligation" to consider how a witness "may be affected by your verdict, any possible motive to testify falsely and the like" (57a-58a).

At the conclusion of the Court's charge the Court failed to discharge the three remaining alternates. The Court stated that the alternates were to be kept in a separate room, but that they were to be "brought back every time the jury itself comes in, if they ever do, to ask any questions and so on" (59a). Defense counsel then directed the Court's attention to Rule 24(c) of the Federal Rules of Criminal Procedure (59a). However, the Court said: "I told you this morning this is what I am going to do and that's that" (60a). The Court noted that "what I am

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* References with the suffix small "a" are to petitioner's Appendix which was filed with the Court of Appeals.

doing here is not what Rule 24 requires which is in effect to have the alternates discharged at the time when the jury is sent in to deliberate". Defense counsel then formally objected and the Court granted "exceptions across the board" (61a). The record indicates that the alternates were not actually in the jury room with the jurors, but it discloses that time and again the alternates were present in the jury box with the jury during its frequent appearances in Court for further instructions and for the answering of its questions (64a-69a, 72a-73a, 76a, 78a, 79a, 81a, 83a, 85a).

On the third day of its deliberations, the jury was given an exaggerated, extreme version of the Allen charge. The Court informed the jury that ". . . you know that time and effort and expense have been devoted to presenting this case. You know also that if you are unable to reach a verdict that it will possibly have to be retried again at more expense by another jury who would be selected in the same way you have been selected" (75a). Defense counsel took specific exception to this (77a), but the Court rejected this exception. The Court said: "But I have been observing now for two days and two evenings what is going on here just from the expression of the faces of the 11 jurors on the one hand and one juror on the other. I also cannot be blind to what was said here in open Court this morning. I cannot be blind to the tenor of the questions and the requests that have been coming in. It seems to me that those combination of circumstances should be kept in account when you consider the timing of what I have just

done" (77a-78a).

Eight hours after delivering its version of the Allen Charge, the Court stated to the jury: "I am going to ask you to retire and see if in the next half or three-quarters of an hour you can reach a verdict [on] all counts, or, at the very minimum, at least, some more counts" (80a). The Court made this statement at 10:45 p.m. At 10:40 p.m. the jury had indicated agreement on 20 counts (79a). It retired at 10:50 p.m. (81a). Forty-five minutes later, the jury returned to announce "a worse impasse than we had before", and it said that "we may lose the verdicts on the ones we have now if we stay any longer, truthfully" (81a). Over defense objection that "this jury should be sent back after a night's rest to resume its deliberations tomorrow," (82a) the Court accepted the jury's verdict on 19 counts (R.610)*. After the partial verdicts were delivered, the foreman said: "Well, your Honor, we have been deadlocked since the time you charged us and right up through today. After we were called in, we were still deadlocked. . . ." (84a-85a). Defense counsel objected that "we are just exploiting their weariness when the jury reports it is infirm [sic] or unsure or indecisive about things" (83a). On the two prior nights the Court had adjourned at a far earlier time to insure that the verdict would not result from the exhaustion of any juror (67a). On June

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* References with the prefix capital "R" are to the numbered pages of the Record on Appeal.

23rd, the Court had excused the jury at 9:40 p.m. (63a-64a) and on June 24th at 9:45 p.m. (69a).

After the jury verdict there still existed a question as to juror No. 4, whom the Court refused to question further as to whether the verdict was hers, saying: "I asked her all I want to" (84a).

Petitioner expects shortly to move in the District Court (if he has not done so by the date of filing of this petition) for a hearing relating to the opportunity of the alternate jurors to influence the jury in its deliberations. Petitioner has contended, and the Government now admits, that the alternate and regular jurors ate in the same restaurant and slept in the same hotel; petitioner also contends they rode in the same conveyance. This motion was impliedly authorized by the Court of Appeals when in its order entered on September 6, 1968 (Appendix B), it denied petitioner's motion for a remand to the District Court "without prejudice to such further application the appellant may wish to initiate in an appropriate proceeding in the District Court."

REASONS FOR GRANTING THE WRIT

POINT I

RULE 24(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE WAS VIOLATED WHEN THE COURT REFUSED THE DEFENSE REQUEST TO DISCHARGE THE ALTERNATE JURORS AFTER THE CASE WAS SUBMITTED TO THE JURY, AND THE ALTERNATES THEN SAT WITH THE JURY IN THE JURY BOX DURING THE JURY'S NUMEROUS RETURNS TO THE COURT FOR FURTHER INSTRUCTIONS. THE HOLDING OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT THAT PETITIONER HAD THE BURDEN OF SHOWING PREJUDICE FROM THIS VIOLATION IS IN CONFLICT WITH THE OPINION OF THE FOURTH CIRCUIT IN UNITED STATES v. VIRGINIA ERECTION CORPORATION, 335 F.2d 868 (4th Cir. 1964). SUCH PROCEDURE VIOLATED PETITIONER'S RIGHT TO A TRIAL BY JURY UNDER THE SIXTH AMENDMENT AND PRESENTS THIS COURT WITH A UNIQUE ISSUE OF FIRST IMPRESSION.

At the conclusion of the Court's charge, the Court failed to discharge the three remaining alternates, notwithstanding Rule 24(c) of the Federal Rules of Criminal Procedure, which provides that alternate jurors must be discharged after the case is submitted to the jury. A proposal that substitution be permitted after the case is submitted was rejected after this Court questioned whether sufficient consideration had been given to its desirability and constitutionality.

See People v. Ryan, 19 N.Y.2d 100, 104 (1966).

As the Court said in United States v. Virginia Erection Corporation, 335 F.2d 868, 871 (4th Cir. 1964):

> "Rule 24(c) is explicit in defining the function of an alternate juror and the time when his replacement of a qualified juror begins, that is, prior to the time the jury retires to consider its verdict. It further provides that an alternate juror who does not so replace a regular juror shall be discharged after the jury retires to consider its verdict." (Emphasis in original).

As the Fourth Circuit noted, it is certain that the alternate has no legal standing as a juror, and that Rule 24(c) requires that he be discharged. Accordingly, the alternates should not have been permitted to remain with the jury during a three-day period of deliberations, during which they were in a position by word or expression to influence the jury during the jury's frequent trips to and from the jury box, at meals and en route to and from and at the hotel.

The fact that Rule 24(c) was violated should of itself constitute reversible error, especially since the trial court specifically acknowledged, in response to clear defense objections, that it was deliberately violating Rule 24(c) (60a-61a). The dangers inherent in such

commingling mandate reversal.

The Court of Appeals found error in the violation of Rule 24(c) but held that petitioner had failed to show prejudice as a result of the commingling. The Court wrote: "Nowhere does it appear that they ate in the same restaurant, rode in the same conveyance, or slept in the same hotel." Appendix A, P. 13. Yet the Court of Appeals also wrote: "The absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24". Appendix A, P. 12. Needless to say, since petitioner could not be present when the jury ate during its three days of deliberations, while it was at a hotel on two nights, and when it rode back and forth between the courthouse and the hotel, there could be no showing in the record of the elements of prejudice required by the Court of Appeals.*

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* On petitioner's motion to remand to the District Court (see Appendix B), the Government conceded that the jurors and alternates ate in the same restaurant and slept in the same Hotel. The Government argued that petitioner had the burden of showing that the United States marshals and jurors had in effect violated their oaths by this further commingling.

POINT II

THE TRIAL COURT'S REFERENCE, IN ITS EXTREME VERSION OF THE "ALLEN" CHARGE, TO THE ADDED EXPENSE OF A RE-TRIAL AND ITS ADMITTED PURPOSE OF PRESSURING THE ONE-HOLD OUT JUROR REQUIRE REVERSAL AS A VIOLATION OF PETITIONER'S RIGHTS TO A TRIAL BY JURY UNDER THE SIXTH AMENDMENT. THE DECISIONS OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT CONFLICT WITH THAT OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

At 2:45 p.m. on the third day of its deliberations, the jury was given an exaggerated, extreme version of the "Allen" charge, which very charge the United States Court of Appeals for the Second Circuit called "a standard 'Allen' charge" in United States v. Bilotti, 380 F.2d 649 (2 Cir. 1967), cert. den., 389 U.S. 944 (1967). Nowhere in Allen v. United States, 164 U.S. 492 (1896), does there appear any reference to the economic drain upon the community that would result from a retrial. However, in petitioner's case the trial court said:

> ". . . you know that time and effort and expense have been devoted to presenting this case. You know also that if you are unable to reach a verdict that it possibly might have to be retried again at more expense by another jury who would be selected in the same way you have been selected." (75a)

This was error as was recently held in State v. Earsery, 428 P.2d 794 (Sup. Ct. Kan. 1967), where the trial court instructed the jury that the lengthy and expensive trial would have to be repeated if no verdict were rendered.

A recent commentary on the Federal Rules of Criminal Procedure, in discussing the Allen Charge, notes that "the strength of the suggestion to continue deliberations must depend upon the complexity of the case," but "this is not the same thing as attempts to salvage the case for purely economic reasons." 8 Moore's Federal Practice - Cipes, Criminal Rules 31-8. On this matter the commentator writes:

> "The second question is whether the court may call to the attention of the jury, as a factor to be considered in their deliberations, that the trial has been a long or expensive one, thereby implying the desirability of avoiding retrial. This is a delicate matter. The suggestion is improper if its point is that guilt or innocence can depend upon how much the trial cost the public, or to impose upon jurors a civic duty to save public funds." Ibid. pp. 31-12, 13, citing United States v. Smith, 303 F.2d 341 (4th Cir. 1962).

Noting that "we have had occasion to approve this instruction [Allen] and

slight variations," the Court in Smith added, "but we disapprove the District Judge's enlargement upon it . . ." (P. 342). One of the enlargements to which the Court specifically referred and which its opinion italicizes is the comment of the District Judge that a jury disagreement would be "expensive to the United States Government" (P. 343). In the words of the Court of Appeals:

> "This expansion, though well intentioned, was objectionably constraining. Unaccented and unembellished, the Allen charge is quite bold enough, and in our opinion these further words did not simply guide the jury but inclined their deliberation." (P. 343)

In petitioner's case, specific exception was taken to the trial court's appeal to the jurors as taxpayers. In rejecting this exception, the Court commented that it knew what was happening for two days and two nights "just from the expression of the faces of 11 jurors on the one hand and one juror on the other."

The comments of the Court demonstrate that the Court's prejudicial gloss on the Allen charge was designed to pressure one specific juror into giving up his convictions. The Court's effort was crowned with success. Although the burden is not on petitioner to show he was prejudiced by the erroneous charge, such showing was in fact made when the foreman of the jury wrote the Court that his verdict

was not voluntary (88a-90a, R.501-2). However, since petitioner relies, not on the foreman's letter, but on the errors in the charge, it is no answer to argue against impeachment of the verdict.

POINT III

AFTER ERRONEOUSLY SETTING A DEADLINE FOR THE JURY, THE COURT THEN RECEIVED ITS PARTIAL VERDICT ABOUT MIDNIGHT ON THE THIRD NIGHT OF ITS DELIBERATIONS, WHEN THE JURY'S FRAME OF MIND WAS ONE OF INDECISION, INSTEAD OF DISCHARGING THE JURY OR PERMITTING IT TO REST AND RESUME THE NEXT MORNING. THUS, PETITIONER'S RIGHTS TO A TRIAL BY JURY UNDER THE SIXTH AMENDMENT WERE ONCE AGAIN VIOLATED. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CONFLICTS WITH THAT OF THE TENTH CIRCUIT IN BURROUGHS v. UNITED STATES, 365 F.2d 431 (1966).

At 2:45 p.m. on the third day of the jury's deliberations the Court delivered its erroneous version of the Allen Charge (Point II, supra). Eight hours later, at 10:45 p.m., the Court erroneously set a time limitation on the jury's deliberations by stating:

> "I am going to ask you to retire and see if in the next half or three-quarters of an hour you can reach a verdict [on] all counts, or, at the very minimum, at least, some more counts." (80a)

The Court should not have accepted partial verdicts over the explicit defense objections in view of the "worse impasse" (81a) and the fact that the jury was in the process of reconsidering the very partial verdicts on which they had so belatedly agreed after the Court's prejudicial deadline. The jury's frame of mind was clearly one of indecision and not decision, and it was prejudicial to the petitioner to receive the partial verdicts at such time.

In view of the lateness of the hour on this third night ("moments before midnight", in the Court's words [R.609]), the jury should have been given the additional night's rest as requested by the defense, and it should have been permitted to resume its deliberations the next day. On the two prior nights the Court had adjourned at a far earlier time in order to insure that the verdict would not result from the exhaustion of any juror. On June 23rd the Court had excused the jury at 9:40 p.m. (63a-64a); and on June 24th the Court had excused the jury at 9:45 p.m. (69a).

This procedure did violence to the belief expressed by the Court at the end of the second night that the jury should not be kept later than 9:30 p.m. or 10 p.m. unless something transpired that might make it sensible to do so (67a).

The defense request for an adjournment to the following morning was in keeping with the procedure adopted by the trial court in United States v. Kahaner, 317 F.2d 459 (2 Cir. 1962), cert. den., 375 U.S. 835 (1963), where the standard

Allen charge, as distinct from the charge in the instant case, was upheld. There the jury had been deliberating for less than one day, unlike petitioner's case where the jury was far into its third night of deliberations. Yet in Kahaner, the Court sua sponte excused the jury until the following morning so that it could return refreshed to its deliberations.

The jury poll did not cure the vice of a verdict wrenched from the jury shortly before the opening moments of Sunday morning, by exploiting its weariness during a period of expressed indecision. The success achieved by the error did not cure its vice.

In view of the jury's clear indecision, it was error to set a time limitation and to receive the partial verdicts within that time limitation set by the Court, instead of permitting the jury to resume its deliberations after a night's rest as requested by the defense. In Burroughs v. United States, 365 F.2d 431 (10th Cir. 1966), the conviction was reversed in just such circumstances. Indeed, in Burroughs no objection was taken, but the Court found plain error in the Sixth Amendment violation.

Petitioner's case is stronger than Burroughs, because in Burroughs the trial court gave the jury until 7 p.m. and added that, if the jury could not agree by that time, the Court would "probably recess the matter until in the morning and then let you go back to deliberations." In petitioner's case the time limitation was set shortly before

midnight on the third day of deliberations. Moreover, unlike Burroughs, the Court did not tell the jury that it could probably rest thereafter. On the contrary, the Court said:

> "It is not my inclination nor my instinct nor my feeling that I want to keep you here forever."
>
> . . .
>
> "In the old days they used to have the system where juries were locked up in durance vile until they came out with a verdict. We don't do that any more, and I don't intend to approach that, I hope." . . . (79a-80a)

Unlike Burroughs, the Court expressly refused to permit the jury to recess until the morning, although it had been deliberating for 14 hours on the third day.

POINT IV

THE COURT'S INSTRUCTION THAT A DEFENDANT'S TESTIMONY WAS TO BE CONSIDERED IN THE LIGHT OF HIS INTEREST IN THE OUTCOME OF THE CASE CONSTITUTES PREJUDICIAL ERROR. THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT CONFLICTS WITH THE HOLDINGS OF THE COURT OF APPEALS OF OTHER CIRCUITS.

The Court instructed the jury that a witness is presumed to tell the truth (57a). Thereafter, having failed to

instruct the jury that petitioner's testimony should be considered as that of any other witness, and instead, having instructed the jury that it had the "right and obligation" to consider how a defendant "may be affected by your verdict", the Court led the jury to believe that it could disregard petitioner's testimony because he had an interest in the outcome of the case (57a-58a). In Phillips v. State, 196 So.2d 363 (Sup. Ct. Miss. 1967), the Court reversed a conviction because of a similar instruction.

This latter instruction, standing by itself, requires reversal. When added to the "presumption of credibility" instruction given by the Court immediately preceding the Court's instruction that a defendant's testimony could be considered in the light of his interest in the outcome of the case, reversal is required all the more. A defendant who wishes to testify is a competent witness, and his testimony is to be judged in the same way as that of any other witness.

In connection with the "presumption of credibility" charge the Court's attention is directed to the recent case of Stone v. United States, 379 F.2d 146 (D.C. Cir. 1967), where the Court said that:

> "Lurking in such an instruction is the risk that the jury might conclude that they were required to accept the testimony of the prosecution's witnesses at face value, particularly when it

is uncontradicted by other witnesses."

In the recent case of Dunfee v. State, 412 S.W.2d 614 (Sup. Ct. Ark. 1967), a presumption of credibility instruction resulted in a reversal. In United States v. Johnson, 371 F.2d 800 (3rd Cir. 1967), the Court noted that the harm was especially pronounced since the defendant presented no evidence (P. 805). United States v. Meisch, 370 F.2d 768 (3rd Cir. 1966) is to like effect. It is no answer for the Government to say that petitioner testified and that, therefore, Johnson and Meisch are distinguishable. Since the Court informed the jury that the defendant's interest in the outcome of the case could and should be considered by it, the result was even more prejudicial than in Johnson and Meisch.

POINT V

THE TRIAL JUDGE'S ANNOUNCEMENT IN THE PRESENCE OF THE JURY THAT HE HAD DENIED PETITIONER'S MOTION FOR ACQUITTAL CONSTITUTED REVERSIBLE ERROR.

After hearing the defense motions at the close of the Government's case out of the hearing of the jury, the Court informed the jury that it had denied the motions of petitioner (17a). The Court's statement to the jury that it had acquitted one co-defendant entirely and another on fifteen counts, clearly communicated to the jury the Court's belief in petitioner's guilt (16a-17a).

Because the Court's denial of a defendant's motion for judgment of acquittal clearly indicates to the jury the Court's belief in the merit of the Government's case, the established practice is for such motion to be made out of the hearing of the jury.

In United States v. Costner, 359 F.2d 969 (6th Circuit 1966), the Court held it to be prejudicial error when, contrary to the requirement of Rule 30 of the Federal Rules of Criminal Procedure that requests to charge be made out of the hearing of the jury, the Court informed the jury that the defense requests for instructions had been denied. Although Costner dealt with a rule where the requirement of secrecy was specifically set forth, the prejudice to a defendant when the jury is told that his motion for acquittal has been denied is far more serious than when the jury is told that his requests to charge have been denied.

CONCLUSION

FOR THE REASONS STATED, THE WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, N. Y.
September 25, 1968

Respectfully submitted,

JEROME J. LONDIN
Counsel for Petitioner

APPENDICES

APPENDIX A

OPINION OF THE COURT BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 206 and 444—September Term, 1967.

(Argued March 11, 1968 Decided July 29, 1968.)

Docket Nos. 31465 and 32164

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

MARVIN HAYUTIN and LEON NASH,

Defendants-Appellants.

Before:

KAUFMAN, HAYS, *Circuit Judges,* and
RYAN, *District Judge.*

Appeal by Leon Nash following jury verdict of guilty returned on June 25, 1966 in the United States District Court for the Southern District of New York before Harold J. Tyler, Jr., *D.J.,* on five counts, charging in Count 1 conspiracy to make illegal unregistered sales of stock and to use the mails in furtherance of a scheme to defraud in the sale of said stock; in Counts 4 and 5, making unregistered sales of stock in violation of Section 5 of the Securities Act of 1933, Title 15, U. S. C. Section 77(e)(a); and in Counts 22 and 23, making fraudulent sales of stock in violation of Section 17 of the Securities Act of 1933, Title 15, U. S. C.,

Section 77q; on which sentence was imposed and judgment entered on February 20, 1967.

Appeal by Marvin Hayutin from judgment of conviction upon jury verdict of guilty returned on March 9, 1967 before John M. Cannella, *D.J.*, on each of 14 counts (of the same indictment on which Leon Nash was convicted); which were Count 1, charging conspiracy, and thirteen substantive counts (2, 3, 4, 5, 6, 8, 10, 12, 14, 16, 18, 19 and 21), charging him with aiding and abetting the sale of unregistered stock in violation of Section 5 of the Securities Act of 1933, Title 15, U. S. C., Section 77(e)(a). Sentence was imposed and judgment entered on May 5, 1967.

These two appeals from judgments entered following two separate trials, were consolidated and were heard simultaneously.

ROBERT M. MORGENTHAU, United States Attorney for the Southern District of New York (Frank M. Tuerkheimer, Paul R. Grand, Pierre N. Leval, Assistant United States Attorneys), *for Appellee.*

CARRO, SPANBOCK & LONDIN, New York, New York (Jerome J. Londin and Allen Green, Esqs.), *for Appellant Leon Nash.*

SHEA GALLOP CLIMENKO & GOULD, New York, New York (Milton S. Gould, Michael Lesch, and Samuel J. Gilbert, Esqs.), *for Appellant Marvin Hayutin.*

RYAN, *District Judge*:

We have here two appeals from judgments of conviction following separate trials, but emanating from the same indictment.

Nash's appeal is from a conviction on five counts after the first trial—on which the jury had disagreed as to Hayutin but convicted 5 other defendants. Hayutin appeals from his conviction on 14 counts after his retrial. Because Nash's sentence had been deferred until February 20, 1967, he did not appeal when his co-defendants did, *United States* v. *Bilotti,* 380 F. 2d 649.[1]

The indictment filed on March 4, 1965, charged 14 individual defendants in 48 separate counts with violations of the anti-fraud provisions of the Securities Act of 1933 (15 U. S. C. Sec. 77q(a)). The prosecution arose from the public marketing and the unregistered sale of common stock of Allied Entertainment Corporation of America during the period from July 1, 1962 through May, 1963. Nash was sentenced to a year and a day on each count, sentences to run concurrently, and fined $500. Hayutin was sentenced to 2½ years on each of 14 counts, sentences to run concurrently, and he was fined $14,000. Since the appeals are from judgments of conviction following separate trials,[2] we have considered and decided them separately.

Both convictions are affirmed.

The Nash Appeal

Nash was convicted of conspiring to make illegal unregistered sales of common stock of Allied Entertainment Corporation of America, Inc. (Allied) and to use the mails and telephone in furtherance of a scheme to defraud in the

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1 Whatever may have been the occasion for the delay, it has resulted in the seriatim hearing of appeals, of defendants who were jointly tried and convicted, a procedure which should be avoided.

2 At both trials, the principal witnesses for the Government were the defendants Schreiber and Gravino, and the co-conspirators Breger and Gafni.

sale of the Allied stock (Count 1);[3] making unregistered sales of the Allied stock in violation of Section 5 of the Securities Exchange Act of 1933, 15 U. S. C. 77(e)(a) (Counts 4 and 5); and making fraudulent sales of Allied stock in violation of Section 17 of the Securities Act of 1938, 15 U. S. C. 77(q) (Counts 22 and 23).

These are the facts as they implicated Nash and by necessity Hayutin, which were developed at the trial.

The conspiracy and the subsequent substantive crimes were born of the efforts of two dentists—Breger and Blistein—to rescue Allied, a small popular music publishing business they had formed, from financial disaster due to an earnings deficit accumulated over four years and lack of working capital. The two dentists-turned financial operators were having difficulty selling 60,000 shares of Allied stock which Allied was offering publicly at $2.50 per share pursuant to an exemption from registration under Regulation A of the Securities and Exchange Commission Rules.[4] By August 20, 1962, only 20,000 to 25,000 shares of the total 60,000 shares offering had been sold. Although Reuben Rose & Co., a brokerage firm, was the underwriter, the actual peddling of the stock was done by Breger and his associates. At this time the securities markets were depressed and a partner of the Rose firm informed Breger that, unless an additional 10,000 to 15,000 shares were sold by September 17, 1962, the date of the expiration of the Regulation A offering, the proceeds already realized would have to be refunded. Breger sought help from one Gear-

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3 Nash was the only defendant convicted on this count, but three co-defendants pleaded guilty to the count and there were other co-conspirators not named as defendants.

4 Regulation A (Title 15, Section 77c(b), Securities Act of 1933) exempts certain public offerings of stock of an aggregate offering price not to exceed $300,000 provided such offering complies with the provisions contained in the regulation (17 C. F. R. Sec. 230.251-63).

hart, a "stock trade" and market manipulator. Gearhart introduced Breger to Hayutin.

Breger related his problems to Hayutin, who then arranged a meeting between Breger and Gravino. It was following this that Gravino approached Nash on the matter. Gravino and Nash were over-the-counter brokers; Gravino was the sole stockholder of Albion Securities Co., Inc., and Nash the sole stockholder of Seaboard Securities Corp. Both of them had had prior dealings with Hayutin.

Gravino told Nash that Hayutin had told him of Breger, of Allied's offering and of the necessity to sell a large number of Allied shares in a short period. Gravino also told Nash that, if he and Nash were to help to sell these shares, they would receive 50 to 75 cents per share in cash over the underwriting commission.[5] Nash told Gravino to arrange for a payoff of $1.25 per share.

On September 2, 1962, there was a meeting at Hayutin's apartment, at which Hayutin, Nash, Breger and Blistein were present. Hayutin made good on the recommendation Gearhart had given Breger that Hayutin "could do the job." Hayutin negotiated a deal. Gravino and Nash undertook to sell approximately 10,000 shares by the close of the offering on September 17, 1962; Breger agreed to pay them a secret cash commission of $1.00 for each share sold, which was to be additional to an offering commission of 25¢ per share, which they were to share with Rose & Co., the underwriters. Gravino and Nash agreed to pay Hayutin 25¢ per share out of what they collected. Gravino and Nash also promised to sell additional shares after September 17, 1962, by which date, Gravino and Nash had sold 7,000 of the 10,000 shares. A meeting was held that day at Gravino's office, which Hayutin, Gravino, Nash, Breger

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5 The offering circular disclosed a commission of 25 cents a share.

and Gravino's partner attended. Breger then paid Gravino and Nash $7,000 in cash, to be divided between them, and they paid 25¢ a share or $1750 in cash to Hayutin.

While Gravino and Nash were selling the 7,000 shares of the offering, Gearhart was the principal trader in Allied Stock. He, working with and protected by Breger's promise to buy from him every share he was forced to purchase, maintained an inflated and rigged price for the stock. Nash and Gravino had met with Hayutin, Breger and Gearhart when the details of this rigged bid operation were set, and, in fact, Nash encouraged and policed Gearhart's activities to the extent of offering him a call at $2.50 when Gearhart succeeded in raising the price to $4 and reporting him to Hayutin when he failed to maintain the price.

Hayutin's, Gravino's and Nash's connections with Breger's activities and Allied financing did not end with the public offering. Breger had told Hayutin in September, 1962, that even with the underwriting, Allied needed some $50,000 in working capital. Hayutin suggested to Breger and Blistein that, during the offering, they buy 5,000 shares of Allied to help in the success of the offering and that these shares could later be resold through Gravino and Nash. After the close of the offering, Hayutin arranged with Gravino and Nash to have them sell publicly these shares which Breger and Blistein had purchased in nominee names. Gravino and Nash agreed with Hayutin that they would pay him 25¢ for each share so sold and that they would equally divide the balance received from Breger. They undertook the sale of the stock, and Hayutin arranged for its delivery. On October 2, 1962, Breger, Hayutin, Nash and Gravino again met in Gravino's office. Breger had with him the 5,000 certificates for the shares purchased by him and Blistein in the names of the nominees. At Nash's

suggestion, the stock of Breger's nominees was sold through Gravino and that of the Blistein's nominees through Nash. Breger had brought no ready cash for the payoff to Nash and Gravino and Hayutin, but this presented no obstacle to their ingenuity. Breger endorsed the name of his nominee to a check payable to her, it was cashed and the proceeds turned over to Nash and Gravino, who, in turn, paid over to Hayutin his 25¢ per share. The remaining nominee shares were later sold by Gravino and Nash, and certificates delivered to them by Breger who paid them off as before. The evidence showed that Nash sold a total of 14,000 Allied shares, receiving payoffs of $15,000.

The unregistered sale of some of this 5,000 lot by Nash's firm to two customers is charged in Counts 4 and 5 to be in violation of Title 15, U. S. C., Sec. 77b(11), d(1) and 3(a), because they were shares owned by Breger and Blistein "controlling persons" of Allied.

Count 4 charges that on October 1, 1962, Nash sold 100 Allied shares to George F. and Eloise T. Roebrig and used the mails to send them a confirmation of the sale. Count 5 charges Nash with the sale on October 9, 1962 of 300 Allied shares to one Bart Feller, and mailing to him a confirmation.

The stock involved in these sales was registered in the names of Chusid and Pisapia, sisters of Blistein who was a person in control. The Chusid-Pisapia shares were part of the shares which had been purchased by Blistein in the names of his sisters as nominees during the initial Regulation "A" offering.

On these two counts, Nash urges that the evidence was insufficient to convict him in that there was confusion arising from the lawful sales of the Regulation "A" securities through September 17, 1962, and the subsequent alleged

unlawful sales of unregistered securities; and that there was insufficient proof that the Blistein stock sold by Nash, part of which he sold as evidenced by the confirmations, was controlled by Blistein and was subject to registration, and that Nash knew this.

Both of these contentions are overwhelmingly refuted by the evidence. The placing of Blistein stock in the hands of nominees for subsequent sale by Nash and Gravino, after the expiration of the Regulation A offer, was part of a plan as to which Nash was a principal actor. Delivery of these certificates was made by Breger, not by the nominees, and it was he who paid Nash his kickback for his successful efforts in their prior sale. The certificates which his two customers received were the certificates held in the names of Blistein's nominees, which Breger had delivered to Nash at Nash's suggestion. The fact that these certificates were delivered to the customer at a later date than that of the confirmation did not alter the fact that the stock they represented had been sold as evidenced by the confirmation. The subsequent delivery of the certificates did but seal the sale. As for Nash's lack of knowledge that this was control stock, raised in defense, the Court's charge was more than fair to defendant.

Among these sales were the fraudulent sales charged in Counts 22 and 23 carried out by Nash through his operating front, Seaboard Securities Corp., and his salesmen Finkleman and Pollinsky. As to these counts, Nash has argued three assignments of alleged error, none have merit or substance.

Count 22 charged Nash with fraudulently selling to Reverend Arthur Dolge on October 12, 1962, 400 shares of Allied stock at $3.50, a sale effected through Finkleman and confirmed by mail. A previous sale had been made to the

Reverend Dolge by Nash through Finkleman on September 5, 1962 of 300 shares at $2.50.

Count 23 charged the fraudulent sale by Nash to a Mrs. Lillian Blum on October 16, 1962 of 100 shares of Allied at $3.50. This sale was made by Nash's salesman Pollinsky; Mrs. Blum, too, received by mail a confirmation of the sale.

Nash's first assignment of error is that the evidence was insufficient to sustain conviction on these fraud counts.

We have pointed out Nash's participation in the market manipulation, maintaining the rigged price of Allied stock and his arranging for and receiving a substantial share of the cash kickbacks of $1.00 to $1.50 per share over and above the disclosed underwriting commission. Nash supervised his salesmen and instructed them to tell purchasers only what was stated in the offering circular. No claim is made that these purchasers were told either of the market manipulations or of the concealed payments made to Hayutin, Gravino, Nash or Gearhart. All that was disclosed in the Regulation A prospectus was the 25¢ commission to the underwriters. Evidence of the concealment of manipulation alone, and certainly combined with concealment of the payments in excess of the amount stated in the offering circular as commission, was sufficient proof of the fraud charged (3 Loss, Securities Regulation, pp. 1560-1561; *Thornton* v. *Securities and Exchange Commission*, 171 F. 2d 702 (2d Cir., 1948); and *Securities Exchange Commission* v. *Torr*, 15 F. Supp. 315, 317 (S. D. N. Y., 1936), rev'd on other grounds 87 F. 2d 446 (2d Cir., 1937)).

The venue argument that there was no proof of actual mailings in the Southern District of New York is answered by the ample circumstantial evidence establishing the mailings in this district. It was shown that both purchasers received the confirmations by mail and that both were resi-

dents of the Eastern District of New York. The confirmations, printed on elaborate forms, bear the legend of Seaboard Securities and state its address to be at 80 Wall Street, New York; no other address is given. Its selling activities—by telephone, by mail and in person—were conducted from this address[6] and the mailing from the Wall Street address was in no manner questioned at the trial. Venue was sufficiently established (*Hill* v. *United States*, 284 F. 2d 754 (9th Cir., 1960), cert. den. 365 U. S. 873).

Second, Nash complains that the charge of the Court was erroneous because, over his objections, it was charged that "a principal is responsible for the crimes of his agent." The general tenor of this contention is that the charge conveyed to the jury the erroneous impression that Nash could be held criminally responsible for misleading representations, made by his salesmen without his knowledge or authorization.

Here, Nash has dissected the charge and, quoting out of context but an isolated portion of it, argues that the instructions as a whole were erroneous and confusing. The trial judge in his charge recognized that there was no general rule in law which makes a principal criminally responsible for the unauthorized acts of his agents, employees or even of his salesmen, and very emphatically told the jury that it "would have to be convinced beyond a reasonable doubt that the proof shows that the defendant himself dominated and controlled his salesmen, and also knew and was participating in the scheme to defraud or sell Allied by means of fraudulent misstatements or statements"—instructions which were repeated.

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6 Pollinsky invited Mrs. Blum down to the office at that address to persuade her to buy the stock she did.

Finally, Nash presses as error the Court's refusal to receive testimony of one Roselin Birnbaum which he contends would support his defense that Breger was the source of the false representations. Objection to this testimony by the Government was sustained by the Court on the ground that it was irrelevant, being only remotely collateral. An offer of proof was permitted to be made and rejected. Breger had already testified that Nash and others had conspired with him to defraud the public and he admitted that he had made numerous false representations to the public in furtherance of the conspiracy. The proffered testimony in no way contradicted the Government's contentions or Breger's testimony; it was simply cumulative proof on an uncontested matter.

The attack on the Court's charge on the conspiracy count is unfounded. Judge Tyler made it clear that proof of the substantive counts, if found to have been in furtherance of a conspiracy, might be considered by the jury as overt acts in proof of the conspiracy.

With one exception, the numerous other alleged errors are so petty as to require no discussion. The exception is the point now urged by Nash that Rule 24(c), F. R. Cr. P., was violated when the trial judge refused the defendant's request to discharge the three remaining alternate jurors after the jury had retired to consider its verdict.

The provision of Rule 24(c) that an alternate juror who does not replace a regular juror "shall be discharged after the jury retires to consider its verdict" is a mandatory requirement, as is that of Rule 23(b) providing for a jury of twelve unless a lesser number is stipulated to in writing by the parties. There is no rule providing that the Court, or the parties, may stipulate for a jury of more than twelve, twelve being the magic number (*United States*

v. *Virginia Erection Corporation,* 335 F. 2d 868). In the face of the mandatory requirement of Rule 24(c) and the Committee's failure at the time of its adoption to include a proposal to permit an alternate juror to replace a regular juror during the deliberations, it is difficult to understand what purpose is to be served by retaining the alternate jurors once the case has been submitted.[7] The reason advanced by the Government in its brief that this procedure presents counsel with the choice of consenting to a substitution if one of the regular jurors became disqualified "prior to the end of the jury deliberations" rather than face a retrial or proceed with less than twelve, is no reason in the absence of any rule or statute authorizing such consent. *United States* v. *Gottfried,* 165 F. 2d 360, cited by the Government, dealt with the clear right of substituting the alternate prior to submission of the case to the jury.

The prejudice flows from the fact that a defendant runs the risk of being tried by more than the twelve jurors guaranteed to him by the Constitution and the Rule, or of being placed in double jeopardy by being tried by more than one jury (*Patton* v. *United States,* 281 U. S. 276).

The absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24.

We turn to the record to see whether in fact, as Nash argues, he ran the risk of having his guilt determined by the three alternates in addition to the regular jurors by reason of the fact that the alternates were in a position to influence the jury in its deliberations.

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7 29 F. R. D. 43.46—Orfield, Trial Jurors in Federal Criminal Cases; Tentative Draft A. B. A. Project on Minimum Standards for Criminal Justice—Trial by Jury—Institute of Judicial Administration, May 1968, *op. cit.*

On this record we can make no such findings. The record shows that the trial judge ruled that three alternates "will have to stay separately" and added "we will have a separate room, and you will be brought back every time the jury itself comes in, if they ever do, to ask any questions and so on." Separate marshals were sworn and assigned for the regular and for the three alternate jurors. Each time during their deliberations that the regular jurors came into the courtroom for further instructions and were seated in the jury box, the alternates were also in the jury box. Nowhere does it appear that they ate in the same restaurant, rode in the same conveyance, or slept in the same hotel.

There is nothing in the trial record which indicates that there was any communication between the regular and alternate jurors after the submission of the case to the jury for verdict. There is no dispute that the record shows that at no time were the alternate jurors in the jury room with the jurors.

On the record before us, we cannot find that defendant Nash was prejudiced by the presence of the alternates. The Government has filed an affidavit by Assistant United States Attorney Grand to supplement the record for the purpose of clarifying the procedure which was followed at the trial of this case. This is not the place for such clarification and we deny leave to make it part of the record, without prejudice to any facts the Government or Nash might wish to develop in some other proceeding.

The Hayutin Appeal

Hayutin was convicted of conspiracy to violate Sections 5 and 17 of the Securities Act of 1933 and of aiding and abetting in illegal unregistered sales of Allied common

stock by the other defendants (Counts 1-6, 8, 10, 12, 14, 16, 18, 19 and 21).

Counts 2-6 related to the participation by Hayutin in the sale by Nash and Gravino of the 5,000 shares of Allied stock which had been purchased by Breger and Blistein in the names of nominees during the Regulation A offering. The remaining eight counts related to Hayutin's participation in further sales of blocks of shares of Allied stock, made on a rigged New York market in connection with some merger deals engineered by Hayutin. Having successfully disposed of the 5,000 shares without benefit of registration and anxious to market much larger amounts of the Allied stock, Hayutin proposed that Allied acquire the assets of two corporations—Tap Records, Inc., and American Stereophonic Corporation—controlled by Miklos Gafni, the president. Both corporations were in financial straits. Hayutin introduced Breger to Gafni and proposed the merger, which was to be accomplished by Allied's acquiring the assets of American Stereo in exchange for 69,500 shares of Allied, and the assets of Tap in exchange for 62,500 shares of Allied. For his part in arranging the acquisition, Hayutin was to receive 10,000 shares of Allied, which at the time was selling for over $3 a share.

A large portion of the shares, ostensibly used to acquire those two companies, was in fact retained by Breger and Blistein in the name of Harold Schreiber, a nominee brought into the deal by Hayutin. The stock was "sold" to Schreiber under guise of a sale by his wife of antique tapes and records to Tap in exchange for its stock. The stock held by Schreiber was then sold through kickbacks to various brokers to the public but when the large volume of the sales in New York made it difficult to maintain the artificially rigged price on the New York market, Hayutin

arranged to sell shares in Europe through his business associate Klaus Fischer, Director of the Bankhaus, Schneider & Munzing in Munich.

Hayutin flew to Germany with Schreiber and there agreed with Fischer to have him peddle the stock in Germany at a $1 kickback, Fischer sending the proceeds in cash back to the defendant in New York. In addition, through reputable brokers in New York with whom his bank dealt, Fischer sold [illegible],700 of these "Schreiber" shares in seven blocks of 500 shares. In order to sell the Allied stock which Gafni had received for American Stereo and Tap upon Hayutin's instructions, Gafni had 24,666 shares of his Allied stock issued or transferred to the names of his wife and relatives. All of this unregistered control stock was subsequently sold to the public. Letters signed by these nominees, claiming all the shares to be exempt from registration, were admitted to have been composed by Hayutin in his handwriting. All the activity came to an end with a collapse of the Allied market. Hayutin's efforts had resulted in the illegal unregistered sale of nearly 50,000 shares of Allied stock, for which up to December 31, 1962 he had received $4250 in cash for his part of the Gravino and Nash sales; a share in the $7500 fee which was paid to Schreiber for the use of his name and his assistance in bringing about the sale of the stock registered to him; and more than 10,000 shares of Allied stock.

Hayutin's counsel concedes that at the trial there was substantially no controversy as to most of the essential facts and that a crime had been committed. He did not argue in defense that the two distributions of Allied stock to the public between September 17, 1962 and the end of May, 1963 were exempt from registration. But he contended, contrary to the Government's contention that Hayutin had

masterminded the criminal plot, that Hayutin was unaware of any wrongdoing; that although a crime had been committed, he had not been a participant; that Breger had been violating the federal securities law long before he ever met Hayutin and that he, Hayutin, had been made the victim of a conspiracy by Breger, Gafni, Schreiber and Gravino to cast all blame upon him. Hayutin also contended that these four conspirators, caught in their wrongdoing, further agreed to falsely testify against him and thus escape just punishment by falsely charging him with being the directing genius of their operations. In connection with this aspect of the defense, Hayutin says that there was error in the trial judge's refusal to receive the testimony of two defense witnesses, which he maintained would have supported his position that he was the victim of a plot by Gafni and Schreiber to inculpate him in order to exculpate themselves; that this testimony was extremely important and relevant to his defense because these two Government witnesses had been called to show that defendant had masterminded the swindle. This evidence was sought to be introduced by the testimony of the two defense witnesses Brenengan and Cumberland. The Government objected and the defendant made the following offers of proof:

As to Brenengan:

> "I offer to prove, your Honor, that in March 1966 Schreiber told this man (Brenengan) that he wasn't worried about the Marketlines letter being closed up because he had some arrangements with the Government about that, that as far as the Allied case was concerned, while Hayutin had nothing to do with the money, they were going to blame it on Hayutin. That is what I offered to prove."

This was later restated by Hayutin's attorney:

> "I offer to prove from him that he met Schreiber in March 1966, that Schreiber told him that he, Schreiber, was not concerned about the Marketlines letter being closed up because he had some arrangements about it with the Government; that he wasn't worried about the Allied case because if the worse came to worse, even though Hayutin had nothing to do with it, he was going to blame it on Hayutin."

As to Cumberland:

> "I offer to prove through this witness, your Honor, that the witness was engaged in some conversations with Gafni during the period February to May, 1963, respecting his, the witness', working for American Stereophonic in some technical capacity; that in late May of 1963 he had a conversation with Gafni and that Gafni told him that there was some trouble about the Allied situation, that that's why he hadn't concluded his arrangements with him, that he was going to be out of the trouble very shortly because he was going to shift all of the blame to Marvin Hayutin; and then the witness said to Gafni. 'Did Hayutin do anything wrong in this case?' And Gafni said, 'No, but he, Hayutin, can take care of himself and I can't, and therefore I am going to put the blame on him.' That's the whole conversation."

This testimony, while relevant and probative of the defense, also brought into issue the veracity of the Government witnesses, whose testimony as we have seen was quite to the contrary, but neither witness, and they were both extensively cross-examined, was confronted with these alleged

conversations. It was on this basis that the Government objected and the Court sustained the objection because Hayutin's counsel was attempting to impeach the witnesses without having confronted them with these prior statements. He was given the opportunity of recalling both witnesses in order to do so but chose not to do so. Counsel argued then and argues now that the testimony was not sought to impeach the witnesses, but to show a state of mind, of bias or hostility, and that such out-of-court statements were relevant on that issue, irrespective of the testimony given on direct examination by the Government witnesses, and thus admissible without reference to their testimony, even if it contradicted it. The general rule is that a prior self-contradictory statement, where used to discredit a witness, is required to be asked of the witness first, in order to give him an opportunity to deny or explain it. The statements sought to be brought out by defense witnesess fell clearly within that rule and on that ground were properly excludable. The rule is not so clear where a "supposed utterance indicating bias" is sought to be used to show bias or prejudice, although Professor Wigmore urges that the same reasons of fairness dictate that the witness be given the opportunity to deny or explain the utterances. (3 Wigmore on Evidence, 3rd ed., Sec. 953; Accord *United States* v. *White,* 225 F. Supp. 514, 519-21 (1963, U. S. D. C.); *Smith* v. *United States,* 283 F. 2d 16 (6th Cir., 1960), cert. den. 365 U. S. 847 (1961).) No case has been cited where the rule was dispensed with where the statement showing bias or prejudice was also self-contradictory of the very testimony being given by the witness. *Comer* v. *Pennsylvania R. Co.,* 323 F. 2d 863 (2nd Cir., 1963) was evidence of an objective fact, tending to show bias, not a contradictory statement of the witness. In *Greatreaks* v. *United States,* 211 F. 2d 674 (9th Cir., 1954)

and *Ewing* v. *United States,* 135 F. 2d 633 (D. C. Cir., 1941), cert. den. 318 U. S. 776, the foundation had been laid through cross-examination. Where the statement is self-contradictory whether it be used to show bias or to impeach, the reason for the rule would seem to be just as strong. (*Burton* v. *United States,* 175 F. 2d 960, 965 (5th Cir., 1949), cert. den. 338 U. S. 909.) In fact, the very reason for counsel's decision not to recall the witnesses was in order not to give them an opportunity to deny the statement attributed to them—an opportunity which the law requires they be given. Whether or not he agreed with the Court, it lay in counsel's power to obtain the admission of this testimony by simply recalling the Government witnesses. That he chose not to do so was clearly the decision of experienced trial counsel who did not anticipate any admissions. Schreiber remained available as a witness and no effort was made to recall him to lay the foundation, it being counsel's position that Schreiber should be called by the Government to give his version of any talk Brenengan might testify he had with Schreiber.

With respect to Gafni, the following colloquy took place:

> ". . . The Court: If you can get Gafni back here again, and I don't know whether you can—is he in California?
>
> Mr. Gould: That isn't practical. It would hold up the trial.
>
> Mr. Grand: I can get him back, but the government won't pay for his return.
>
> Mr. Gould: I am not going to bring Gafni and have him deny that the conversation took place, your Honor."

Hayutin and his brother Harvey had also testified that Schreiber and Gafni threatened to implicate Hayutin if they were not bought off. Hayutin had been afforded full oppor-

tunity to demonstrate Schreiber's and Gafni's attitudes or "states of mind" toward Hayutin, and perhaps he decided that the testimony of his witnesses would add little. Having made his choice, he should not now urge the "exclusion" of this testimony as error.

Hayutin's second point is that the Court should have directed the taking of the testimony by deposition of the defendant Fischer. Before Hayutin's second trial, he moved for the third time under Rule 15(a), F. R. Cr. P., for an order to take the deposition of Klaus Fischer, a citizen of Germany residing in Munich. Fischer is a defendant named in Count 1 of the indictment. Fischer has never been arrested on this indictment nor has he come to this country. The taking of a deposition, especially on the eve of trial, and the setting of conditions for it, was clearly within Judge Cannella's discretion (*United States* v. *Kelly,* 349 F. 2d 720, 769-70 (C. A. 2, 1965), cert. den. 384 U. S. 947 (1966)). He set the conditions and we cannot say they were unreasonable, if the deposition was to have any meaning. It was clearly doubtful that Fischer was willing and available to submit to deposition since he was invoking German law as to his incompetence as a witness and defendant, and the fact that he was unwilling to attend was not tantamount to being unable to attend (Rule 15(a)).

The remaining points on "control" under the Securities Act of 1933 and cross-examination of character witnesses are disposed of by our decisions in *United States* v. *Re,* 336 F. 2d 306 (2d Cir.), cert. den. 379 U. S. 904 (1964), and *United States* v. *Bilotti,* 380 F. 2d 653-654.

The argument that sending a confirmation slip is not a sale is answered by the language of the statute Section 2(10), 15 U. S. C. 77(b)(10); by *United States* v. *Hughes,* 195 F. Supp. 795; and by common sense.

The convictions are affirmed.

APPENDIX B

ORDER OF THE COURT BELOW

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of September, one thousand nine hundred and 68

United States of America,

Plaintiff-Appellee,

v.

Marvin Hayutin and Leon Nash,

Defendants-Appellants,

Armand Bilotti, et al.,

Defendants.

(and another case)

It is hereby ordered that the motion made herein by counsel for the appellant Leon Nash by notice of motion dated August 9, 1968 to stay issuance of the mandate pending petition for a writ of certiorari to the Supreme Court of the

United States and for a remand to the United States District Court for the Southern District of New York and for other and further relief is disposed of as follows: The motion for a remand to the United States District Court for the Southern District of New York is denied without prejudice to such further application the appellant may wish to initiate in an appropriate proceeding in the District Court. The motion for a stay of the mandate pending petition for a writ of certiorari is granted subject to the conditions of Rule 41(b) of the Federal Rules of Appellate Procedure.

IRK

PRH

Circuit Judges